Supreme Court, U. S.
FILED
FEB 6 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978

NO. 78-
78-1224

THOMAS P. LUKEFAHR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

EDWIN MARGER
ROBERT L. BARR, JR.
Law Offices of Edwin Marger
Suite 320, 6666 Powers Ferry Road
Atlanta, Georgia 30339
(404) 955-1010

ATTORNEYS FOR PETITIONER

FERDINAND J. KLEPPNER
Grisbaum and Kleppner
3224 North Turnbull Dr.
Metairie, Louisiana 70002
(504) 887-6571

OF COUNSEL

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978

NO. 78-

THOMAS P. LUKEFAHR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT
OF LOUISIANA

EDWIN MARGER
ROBERT L. BARR, JR.
Law Offices of Edwin Marger
Suite 320, 6666 Powers Ferry Road
Atlanta, Georgia 30339
(404) 955-1010

ATTORNEYS FOR PETITIONER

FERDINAND J. KLEPPNER
Grisbaum and Kleppner
3224 North Turnbull Dr.
Metairie, Louisiana 70002
(504) 887-6571

OF COUNSEL

INDEX

Page

Table of Cases Cited iii

Statutes Cited vi

Other Authorities Cited vi

Citation to Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 7

Federal Questions Raised and Decided Below 12

Reasons for Granting the Writ:

I. This Court should grant certiorari to consider whether, in a warrantless post-custodial vehicle search, the Defendant must be afforded an opportunity to testify as to the issue of consent 15

II. This Court should grant certiorari to consider whether a consent to a warrantless post-custodial search of a Defendant's vehicle after a

traffic stop may be valid if based on the uncorroborated testimony of the State that the Defendant indicated no opposition to the search, and where no evidence was submitted indicating the Defendant was made aware that he did not have to consent to a search 34

Conclusion 44

Appendix A - State of Louisiana v. Lukefahr, 363 So.2d 661 (La. 1978)

Appendix B - Pages from Trial and Hearing Transcripts cited in this Petition

TABLE OF CASES CITED

Page

Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968). 19, 23, 24

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975) . 43

Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968) . 25, 35, 39

Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1974) . 17

Collins v. United States, 289 F.2d 129 (5th Cir. 1961) 16

Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761 (1966) . 36

Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946) . 34

Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281 (1957) . 28, 35

Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302 (1948) . 35

Harris v. United States, 390 U.S. 234, 88 S.Ct. 992 (1968) . 17

Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098 (1947). 19

Henderson v. United States, 12 F.2d 528 (4th Cir. 1926) 19

Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 (1959) . 23

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 15

Table of Cases - cont'd — Page

Ker v. California,
374 U.S. 23, 83 S.Ct. 1623 (1963). . 15

Mapp v. Ohio,
367 U.S. 643, 81 S.Ct. 1684 (1961) . 15

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602 (1966) . 42

Pace v. Beto,
369 F.2d 1389 (5th Cir. 1972) 24

Payne v. Arkansas,
356 U.S. 560, 78 S.Ct. 844 (1958). . 35

Schneckloth v. Bustamonte,
412 U.S. 218, 93 S.Ct. 2041 (1973) . 15, 34, 35, 36, 39, 40 41, 42, 43

State v. Andrus,
250 La. 765, 199 So.2d 867 (1967). . 35

State v. Angel,
356 So.2d 986 (La. 1978) 34

State v. Coleman,
254 La. 264, 223 So.2d 402 (1969). . 29, 30

State v. Dunbar,
356 So.2d 956 (La. 1978) 26, 36

State v. Franklin,
353 So.2d 1315 (La. 1978) 26

State v. Hills,
283 So.2d 220 (La. 1973) 17

State v. Lovett,
345 So.2d 1139 (La. 1977) 28, 30, 31

State v. Lukefahr,
363 So.2d 661 (La. 1978) . . . . . passim

State v. Meichel,
290 So.2d 878 (La. 1974) 20

Table of Cases - cont'd — Page

State v. Mitchell,
360 So.2d 189 (La. 1978) 25, 40

State v. Navarro,
312 So.2d 848 (La. 1975) 20

State v. Schmidt,
359 So.2d 133 (La. 1978) 15, 25

State v. Tant,
287 So.2d 458 (La. 1973) 17

State v. Thomas,
208 La. 548, 23 So.2d 212 (1945). . . 30, 31

Taglavore v. United States,
291 F.2d 262 (9th Cir. 1961). 19

United States v. Cruz,
559 F.2d 300 (5th Cir. 1977) 24

United States v. Edwards,
441 F.2d 749 (5th Cir. 1971) 24

United States v. Rabinowitz,
339 U.S. 56, 70 S.Ct. 430 (1950). . 19

United States v. Robinson,
414 U.S. 220, 94 S.Ct. 467 (1973). . 20

United States v. Tharpe,
536 F.2d 1098 (5th Cir. 1976) 24

Zap v. United States,
328 U.S. 624, 66 S.Ct. 1277 (1946) . 34

STATUTES CITED

Page

La. Constitution, 1974, Art. 1, §5 . . . . . 3, 27

La. Code Crim. Proc. Art. 213. . . . . 3, 14, 15

La. Code Crim. Proc. Art. 703. . . . . 4, 14, 15

La. R.S. 40:966(A)(1) 7

OTHER AUTHORITIES CITED

Pugh, Louisiana Evidence Law, 1978 Supplement. 26

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978

NO. 78-

THOMAS P. LUKEFAHR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana entered on October 9, 1978, rehearing denied November 9, 1978.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at 363 So.2d 661 (1978) and is set out in Appendix A attached hereto.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on October 9, 1978, and a timely petition for rehearing was denied on November 9, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the failure of the trial Court to allow Petitioner to testify concerning an alleged post-custodial consent to search Petitioner's vehicle violates the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Whether a post-custodial warrantless search of a motor vehicle following an alleged moving traffic violation, based on the uncorroborated testimony of the State that Petitioner consented to such search, where the State took no steps to

inform Petitioner that consent was a matter of choice, violates the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and the following section of the Louisiana Constitution:

Art. I, §5 Right to Privacy.

> "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."

This case also involves the following provisions of the Louisiana Code of Criminal Procedure:

Art. 213. Arrest by Officer Without Warrant; When Lawful

> "A peace officer may, without a warrant, arrest a person when:

(1) The person to be arrested has committed an offense in his presence; and if the arrest is for a misdemeanor it must be made immediately or on close pursuit;

(2) The person to be arrested has committed a felony, although not in the presence of the officer;

(3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer; or

(4) The peace officer has received positive and reliable information that another peace officer holds a warrant for the arrest.

A peace officer in close pursuit of a person to be arrested, who is making an arrest pursuant to this article may enter another jurisdiction in this state and make the arrest. Amended by Acts 1972, No. 646, §1."

Art. 703 Motion to Suppress Evidence

"A. A Defendant aggrieved by an unconstitutional search or seizure may move to suppress, for use as evidence at the trial on the merits, any tangible objects or other property, or documents, books, papers or other writings, on the ground that they were so obtained. A motion filed under the provisions of this Paragraph must be filed no later than three judicial days before trial on the merits begins, except where the Defendant receives notice of trial thirty days before trial on the

merits, then such motion must be filed no later than fourteen calendar days before the trial on the merits begins, unless opportunity therefor did not exist or the Defendant was not aware of the grounds for the motion. The Court in its discretion may permit the filing of such a motion to suppress at any time before or during the trial. Amended by Acts 1975, No. 814, §1.

B. A Defendant may move to suppress for use as evidence at the trial on the merits a written confession or written inculpatory statement, on any ground that would make it inadmissible as evidence. Such a motion to suppress must be filed no later than three judicial days before trial on the merits begins, except where the Defendant receives notice of trial thirty days before trial on the merits, then such motion must be filed no later than fourteen calendar days before the trial on the merits begins, and shall be heard and decided by the Court prior to trial.

A ruling prior to trial on the merits, upon a motion to suppress a written confession or written inclupatory statement, is binding at the trial on the merits. However, a failure to file prior to the trial on the merits a motion to suppress a written confession or written inculpatory statement does not prevent the Defendant from objecting to the admissibility thereof at the trial on the merits,

and a ruling made adversely to the Defendant prior to the trial on the merits upon a motion to suppress a written confession or written inculpatory statement does not prevent the Defendant from introducing evidence during the trial concerning the circumstances surrounding the making of a written confession or written inculpatory statement for the purpose of enabling the jury to determine the weight to be given to it.

When a ruling on a motion to suppress is adverse to the Defendant, the state shall be required prior to presenting the written confession or written inculpatory statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the written confession or written inculpatory statement for the purpose of enabling the jury to determine the weight to be given to it. Amended by Acts 1975, No. 814, §1.

C. On the trial of a motion to suppress filed under the provisions of this article, the burden of proof is on the Defendant to prove the grounds of his motion, except that the state shall have the burden of proving that a purported written confession or written inculpatory statement was made freely and voluntarily and was not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Louisiana, entered October 9, 1978, timely rehearing denied November 9, 1978, affirming Petitioner's conviction. Petitioner was found guilty on May 3, 1977 by unanimous vote pursuant to a trial by jury of possessing with intent to distribute and dispense marijuana, in violation of La.R.S. 40:966(A)(1). Petitioner was sentenced to the maximum ten year's imprisonment at hard labor, with an additional year if he could not pay the fine of fifteen thousand dollars also levied.

Petitioner was taken into custody the morning of February 22, 1977 and charged with the above violation. On April 27, 1977 the trial Court held a hearing to consider Petitioner's Motion to Suppress Evidence -- approximately four thousand pounds of marijuana --seized during a warrantless search of the truck driven by Petitioner. During the hearing on the Motion to Suppress, Petitioner voluntarily took the stand and testified that at the time of his arrest, no warrant was shown him and that he did

not consent to the police officer's search of the locked truck which he had been driving. (Transcript of the Hearing on the Motion to Suppress, Volume I, pages 23-24)[1] On cross-examination, the State proceeded to question Petitioner as to matters unrelated to the question of consent, such as Petitioner's activities in the State of Louisiana over an extended period of time preceding his arrest. (H.T., v.I, pp.25-27) At that time, Petitioner asserted his right against self-incrimination as to those questions unrelated to the issue of consent to a warrantless search, which was the basis of the Motion to Suppress, since to testify on unrelated matters could raise questions concerning other possible criminal activities. Although Petitioner expressed a willingness to be subject to cross-examination on the issue of consent, the judge struck

---

1/ For purposes of clarity, the four (4) transcripts to which references will be made are designated as follows: Volume I of the transcript of the Hearing on the Motion to Suppress as "H.T.,v.I."; Volume II of the transcript of the Hearing on the Motion to Suppress as "H.T., v.II"; Volume I of the Transcript of the Trial as "T.T.,v.I"; and Volume II of the Trial Transcript as "T.T.,v.II". The pages from these transcripts cited in this Petition are attached hereto at Appendix B.

from the record all of Petitioner's testimony, ruling that Petitioner, in taking the stand to testify, opened himself to cross-examination on a wide variety of matters into which the State intended to go, and that Petitioner could not plead his Fifth Amendment privilege as to those issues other than the issue of consent (the reason Petitioner had taken the stand). (H.T., v.I, pp. 28-35, 37-41). Petitioner had no further opportunity to testify before trial, and he did not take the stand during the trial.

During the hearing on the Motion to Suppress, the State asserted that Petitioner consented to the search of the vehicle which he was driving at the time of arrest. (H.T., v.II, pp. 50, 62-63) This testimony was uncorroborated since only one officer was present when the truck was opened. Similar uncorroborated testimony was presented at the trial. (T.T., v.II, pp. 19-20, 34)

As revealed through testimony, Petitioner, who had been under surveillance for suspected contraband activity, was driving in the early morning hours on a Louisiana State Highway when a police siren emanating from a vehicle with flashing red

lights signaled him to pull his vehicle over and stop. (T.T., v.I, pp. 92-93) At that time, a second law enforcement vehicle which had been driving some distance in front of Petitioner's truck was following the first police vehicle. The driver of the second vehicle was Sergeant Johnny Holcomb of the Louisiana State Police; the driver of the State vehicle immediately behind Petitioner which signaled him to stop was Lieutenant Wharton T. Wicker, also of the Louisiana State Police. Petitioner's vehicle, which had been followed by the State vehicles for some distance, was signaled to pull over and stop because the Petitioner allegedly had driven left of the center line and had thereby forced another unidentified automobile onto the shoulder. (T.T., v.I, pp.92-93; T.T., v.II, pp. 5-6, 27, 31, 33-34)

After Petitioner was stopped and had emerged from the truck, Lieutenant Wicker informed him he was arresting him for the traffic violation and asked to see his driver's license. Upon furnishing the driver's license, Lieutenant Wicker asked Petitioner several questions about the truck and Petitioner's out-of-state license. (T.T., v.II, pp. 7-8, 13,

15-18) In response to these questions, Petitioner stated that he was being paid to drive the truck for someone else and that he did not know who owned it. In response to another question from Lieutenant Wicker, Petitioner stated he did not know what, if anything, was contained in the rear of the truck. (T.T., v.II, p. 19) At this point, Sergeant Holcomb, who had been involved in the earlier surveillance of Petitioner, was not in the immediate vicinity of Petitioner's truck, having pursued another vehicle thought erroneously to be connected with Petitioner's activities at the time Petitioner's truck was being stopped (T.T., v.I, pp. 101-103 and H.T., v.II, p. 69) Lieutenant Wicker, who had in fact been informed earlier by Sergeant Holcomb that he was to follow Petitioner's truck because it was suspected of having engaged in illegal contraband activity, asked Petitioner if he could see what was in the truck. According to the Lieutenant's uncorroborated testimony, Petitioner stated that he had no objection to the officer inspecting the rear of the truck and proceeded to unlock the doors. (T.T., v.II, pp. 19-20, 34 and H.T., v.II, pp. 62-63) When the doors to the truck were

opened, approximately four thousand (4,000) pounds of what was later confirmed to be marijuana, packaged in large bales, was revealed. Sergeant Holcomb, who had by this time returned to the location of the truck, charged Petitioner with possession of marijuana with intent to distribute (T.T., v.I, p. 109). No warrants were shown Petitioner, and none in fact were issued.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

I. Before trial, Petitioner moved to suppress the evidence on which his conviction was based, on the grounds that it had been seized illegally in violation of the Fourth Amendment to the Constitution of the United States. In substance, this motion was based on the proposition that, in a warrantless search and seizure as in the instant case, the State must meet the burden of establishing that the evidence was seized under one of the limited exceptions to the requirement of the Fourth Amendment that legal searches and seizures will hold only upon issuance of a valid warrant. In this case case, the

State contended that Petitioner had given his consent to the search. Petitioner, however, maintained in his Motion to Suppress that he had not, in fact, given his consent to search; he sought, unsuccessfully, to testify on this issue. Although Petitioner recognized the State could properly cross-examine him once he took the stand to refute the State's contention that he consented to the search, Petitioner sought to properly protect himself against self-incrimination on other matters by invoking the Fifth Amendment when the State attempted to cross-examine him as to matters unrelated to the issue of consent, including questions of his activities in Louisiana over an extended period of time. The trial judge did not allow Petitioner to so testify, and struck from the record of the hearing all statements made by Petitioner, including those in which he swore he had not given consent to search the truck. (H.T., v.I, supra) Petitioner's Motion to Suppress was subsequently denied. In the Court below, Petitioner's Specifications of Error numbers 3, 4, 7, 13, 60 and 73 asserted that his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States,

and his rights under Article I, Section 5 of the Louisiana Constitution, and Articles 213 and 703 of the Louisiana Code of Criminal Procedure, had been violated. These issues were briefed and rejected by the Supreme Court of Louisiana in a decision handed down on October 9, 1978. Petitioner re-asserted his claims in a timely Petition for Re-hearing, which was denied by the Supreme Court of Louisiana on November 9, 1978.

II. Before trial, Petitioner moved to suppress evidence of the violation of Louisiana law as charged, on the basis that, if the Court were to find that consent to search had in fact been given, such consent was not given freely and voluntarily but rather in violation of Petitioner's rights secured by the Fourth and Fifth Amendments to the Constitution of the United States in that he was forced to incriminate himself, and that the State conducted an unreasonable and illegal search of his vehicle. Petitioner asserted these rights and their violation in his Specification of Errors to the Supreme Court of Louisiana as noted in Paragraph I of this Petition, supra.

REASONS FOR GRANTING THE WRIT

I. This Court should grant Certiorari to consider whether, in a warrantless post-custodial vehicle search, the Defendant must be afforded an opportunity to testify as to the issue of consent.

Under the Fourth and Fourteenth Amendments to the Constitution of the United States, a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); cited in Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, (1973). The State has the burden of showing that a search in fact falls within one of those limited exceptions to the Constitutional warrant requirement. State v. Schmidt, 359 So.2d 133 (La. 1978); La. Code Crim. Proc. Art. 213, 703. Decisions by this Court have determined that the Fourth Amendment to the Constitution of the United States, and the so-called "Exclusionary Rule" derived therefrom, are binding on the states. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961); Ker v. California, 374 U.S. 23, 81 S.Ct. 1623 (1963).

Even though it is state law that determines the validity of an arrest, the arrest and any subsequent search must fulfill the basic requirements of the Fourth Amendment. Collins v. United States, 289 F.2d 129, 131 (5th Cir. 1961). In meeting that burden, the state may show, among other things, that the search: (1) involved evidence in "plain view", (2) was a border search, (3) involved exigent circumstances, (4) was incident to a valid arrest, or (5) was pursuant to consent of the Defendant. For the reasons set forth infra, and based on the circumstances of this case, Petitioner asserts that exceptions (1) through (4) are inapplicable to the instant case, and that the key issue is whether Petitioner consented to the search and the failure of the State to provide him the opportunity to dispute the State's testimony on that issue.

(1) Plain View

In the instant case, the evidence seized by the State -- approximately four thousand pounds of marijuana -- was contained completely within the closed storage compartment of the truck which Petitioner was driving. The storage area of the truck was completely separate from the passenger/ driver compartment and had no windows; the only door into the

compartment, at the rear of the truck, was secured by a locked padlock. (T.T., v.II, P. 18) Thus, the facts of this case could not support a finding that the evidence was seized pursuant to the plain-view exception to the Fourth Amendment warrant requirement. [2]

(2) Border Search

A second exception to the Fourth Amendment warrant requirement is the border search. The instant case, however, involved an arrest and search of a defendant apprehended wholly within the State of Louisiana and not a search at or near, or subsequent to Petitioner's crossing, an international border of the United States.

(3) Exigent Circumstances

Law enforcement officials may also conduct a valid search without a warrant when exigent circumstances, relating to factors such as movement or disappearance of the evidence, require immediate action on the part of the officers. Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1974); State

---

2/ For discussion of the plain-view exception, see Harris v. United States, 390 U.S. 234, 88 S.Ct. 992 (1968); State v. Hills, 283 So.2d 220 (La. 1973).

v. Tant, 287 So.2d 458 (La. 1973). According to testimony in the instant case, Petitioner was driving a truck on a Louisiana State Highway, and had been under surveillance and was in fact being trailed, for some time. The State admits it did not anticipate that the truck or the evidence seized therein would be lost, removed or destroyed imminently; in fact, Sergeant Holcomb of the Louisiana State Police testified that he did not want to stop Petitioner while he was travelling on the highway, but would have preferred to have awaited his arrival at his destination. (H.T., v. II, pp. 16-17) Moreover, the State admitted it had sufficient time to obtain a warrant (H.T., v.II, p. 4) Finally, the State offered no testimony that would tend to indicate that the evidence would or could be destroyed or removed. (T.T., v.II, pp. 33-34 and H.T., v.II, pp. 59-60) Thus, the warrantless search and seizure of the evidence in this case cannot be validated under the exigent circumstances exception to the Fourth Amendment warrant requirement.

(4) Incident to Valid Arrest

An otherwise invalid warrantless search may

also be validated if conducted incident to a valid arrest; such search may extend to the person of the Defendant and the immediate surroundings. Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, (1947); United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, (1950). Such a search, however, may not be the pretext for what would otherwise be an illegitimate search. The search must bear a direct relation to the nature and purpose of the actual arrest, and the fact that contraband is later discovered may not legitimize the search as one incident to a valid arrest.

Particularly in cases involving arrests for alleged traffic offenses, a search incident to a valid arrest that is otherwise unreasonable is not made reasonable if there is a lack of relationship between the search and the offense for which the arrest was made. Amador-Gonzalez v. United States, 391 F.2d 308, 312-314 (5th Cir. 1968); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961); Henderson v. United States, 12 F.2d 528 (4th Cir. 1926). Furthermore, although this Court has held that a search of a Defendant's person after being stopped for a traffic offense does not violate the Fourth

Amendment, the Court has not extended that exception to a search beyond the Defendant's person and immediately adjacent area; in other words, to the entire vehicle, be it automobile or truck, driven by the Defendant at the time of stopping. United States v. Robinson, 414 U.S. 220, 236, 94 S.Ct. 467, 477 (1973). The Supreme Court of Louisiana, likewise, has been unwilling to extend searches incident to traffic arrests to validate warrantless searches of the entire vehicle. State v. Navarro, 312 So.2d 848, 855 (La. 1975) State v. Meichel, 290 So.2d 878 (La. 1974).

In the instant case, the State's undisputed testimony indicates that the officer who actually stopped and arrested Petitioner did so only because he allegedly saw Petitioner commit a moving violation -- crossing the center line of the highway and thereby forcing another unidentified vehicle to leave the roadway and travel on the shoulder. (T.T. v.I, p. 118; T.T., v.II, pp. 27, 31, 34; and H.T., v.II, pp. 4-5, 59) (Even here, Petitioner was not afforded the chance to refute the State's assertions.) Immediately after Petitioner was stopped for the alleged traffic violation, the apprehending

officer, Lieutenant Wicker, asked Petitioner for his driver's license, which was promptly furnished. According to his testimony, Lieutenant Wicker then noticed what he considered to be three relevant facts: (1) Petitioner's truck bore a Florida license plate that, although valid, was "loosely fastened" to the truck; (2) affixed to the door of Petitioner's truck was a commercial sign for a Baton Rouge, Louisiana establishment; and (3) Petitioner's driver's license was from Florida. Testifying that these factors aroused his suspicions, Lieutenant Wicker then questioned Petitioner as to where he was going, to whom the truck belonged, and what the truck contained. According to the State's testimony, in response to this series of questions, Petitioner, indicated he was lost and tired, had been paid a sum of money to drive the truck for someone else, and that he did not know what was in the truck. It was at this point, again according to the State's testimony, that Lieutenant Wicker asked Petitioner if he would open up the back of the truck. (T.T., v.II, pp. 18- 19 and H.T., v.II, p. 50) The issue of consent to search, which arose at this point, will be discussed infra. At the point at which the question of consent

arose, however, Petitioner had been placed in custody for an alleged traffic offense, and the stopping officer was "armed" with nothing more than (1) an earlier oral opinion from another officer that Petitioner was a suspect, and (2) certain "suspicious" characteristics of Petitioner's truck.

Petitioner does not deny the State could properly stop him for a traffic violation if one in fact occurred. Petitioner does assert, however, that the traffic arrest -- even if valid and not as a pretext -- did not and cannot provide grounds for a warrantless search of his vehicle. Only if other factors -- not present in this case -- arise after the traffic stop, giving the State probable cause to believe a crime had been or was being committed, would the State be allowed to proceed further with a warrantless search under an exception to the Fourth Amendment warrant requirement. In this case, Lieutenant Wicker had not seen Petitioner engaged in any illegal activity other than the alleged traffic offense, there was no illegal contraband in plain sight, and no testimony was offered that Lieutenant Wicker detected any odor of marijuana surrounding the vehicle before the door was opened. Although Lieutenant

Wicker may have had a suspicion that there was marijuana in the truck, based on some general information received earlier from Sergeant Holcomb that Petitioner was being watched and that there might be a "bust", that information, absent additional information not present according to the facts of this case, is insufficient to sustain the warrantless search of Petitioner's truck. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 (1959). [3]

3/ In Henry, as in the instant case, officers had vague information that cartons which were earlier seen being loaded into Defendant's car contained contraband. Again, as in the instant case, however, the officers did not know what the cartons contained, and the Court held that the cartons were inadmissible since they were seized under a warrantless search of Defendant's vehicle which had been stopped for other purposes.

In Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), another case with circumstances remarkably similar to those in the instant case, the Fifth Circuit explicitly rejected the notion that "[O]nce a valid traffic arrest has been made, any search of the vehicle stopped is valid." On the contrary, the Court argued strenuously that "[T]here are no fruits, instrumentalities, and contraband reasonably connected with an automobile driver's improper turn, speeding, and failure to have a driver's license -- regardless of the arresting officer's motives." The Court concluded that the search of a vehicle after being stopped for a routine traffic violation was an improper pretext to allow law enforcement officers to search the car for narcotics, notwith-

It was only after the rear of Petitioner's truck had been opened, and the marijuana exposed, that Sergeant Holcomb -- who arrived at the back of the truck after the doors had been opened -- arrested Petitioner for the drug offense. (T.T., v. I, p. 109)

It is respectfully submitted, therefore, that since the search of Petitioner's truck without a warrant was not validated by any of the above-mentioned exceptions to the warrant requirement,

---

Footnote 3, cont'd

standing the fact that the officers had some reason to suspect narcotics were in the car. Amador-Gonzalez v. United States, supra, at 317, 318.

Subsequent decisions by the Fifth Circuit reaffirm the "pretext" principle of Amador-Gonzalez, that a search of a Defendant's vehicle for narcotics subsequent to a traffic stop, when the real purpose for the stop was or appeared to be a desire to look for narcotics without a warrant, is invalid. United States v. Cruz, 559 F.2d 300, 303 (5th Cir. 1977). (Amador-Gonzalez distinguished on the facts); United States v. Tharpe, 536 F.2d 1098, 1101 (5th Cir. 1976); Pace v. Beto, 469 F.2d 1389, 1390 (5th Cir. 1972) (nervous demeanor of defendant after traffic stop does not validate an otherwise illegal search); United States v. Edwards, 441 F.2d 749, 754 (5th Cir. 1971) (Amador-Gonzalez re-affirmed and distinguished as this case involved an abandoned vehicle).

the only grounds on which the State could validate the search was on the basis of consent.

(5) Consent

While consent searches are recognized and have been recognized by this Court as an exception to the Fourth Amendment warrant requirement, this Court has held that "[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792 (1968). Although the Supreme Court of Louisiana has recognized that there is still some lack of clarity regarding the precise burden the State must satisfy in establishing valid consent, its decisions are in accord with those of this Court, that once the Defendant makes an initial showing at a hearing on a Motion to Suppress that a warrantless search occurred, the State must thereafter assume the burden of affirmatively showing that the search is justified under one of the exceptions to the warrant requirement, including consent. State v. Mitchell, 360 So.2d 189, 190 (La. 1978); State v.

Schmidt, 359 So.2d 133 (La. 1978); State v. Dunbar, 356 So.2d 956, 961 (La. 1978); State v. Franklin, 353 So.2d 1315 (La. 1978) [4]

Issues related to consent to a warrantless search, including specifically the issue of "voluntariness" (discussed in detail infra) decided by this Court and the highest Court of the State of Louisiana, necessarily presuppose, as part of Due Process, that an aggrieved person shall have the opportunity and right to raise issues relating to consent in an appropriate forum and at an appropriate time. Without this, a Defendant would have no opportunity to counter the State's efforts to validate a warrantless search on the basis of consent. (See cases cited immediately supra.) This Due Process right, be it exercised at a pre-trial hearing on a Motion to

4/ Article I, Section 5 of the Louisiana Constitution of 1974 specifically provides that a "[a] person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate court."

See also, Baier, "Arrest, Search and Seizure," excerpted in Pugh, Louisiana Evidence Law, 1978 Supplement at 316, 319-326; and Lamonica, "The Attempt to Seize," excerpted in Pugh, ibid. at 309-313.

Suppress or during the trial, cannot be held to be in conflict with the Defendant's right against self-incrimination under the Fifth Amendment to the Constitution of the United States, else the former right would be utterly hollow. In other words, the Defendant must have the opportunity to dispute the State's contention that he consented to an otherwise invalid warrantless search by presenting testimony or other evidence to that effect, without thereby and necessarily waiving his Fifth Amendment right against self-incrimination as to other matters. If a Defendant avails himself of the opportunity to dispute the State's contention that he consented to a search, he should not be forced to do so at the peril of opening himself to cross-examination without the opportunity to "plead the Fifth" as to other issues unrelated to the issue of consent. [5] The Defendant's right

5/ Many of the cases in this area decided by the Supreme Court of Louisiana involve the voluntariness of a written confession or inculpatory statement. In such cases, the Supreme Court of Louisiana has held that, at a hearing before a judge prior to the State introducing an alleged written confession, the Defendant may

against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States exists independent of any other rights afforded a Defendant under other provisions of the Constitution of the United States or under a State Constitution. Concluding, as was the result of the trial judge's ruling in this case, that a Defendant may avail himself of the right to contest the State's assertion that he consented to a warrantless search only under penalty of waiving his right against self-incrimination as to other unrelated matters, in effect denies a Defendant his rights under the Fifth Amendment to the Constitution of the United States, and affronts a Defendant's Due Process rights secured by the Fourteenth Amendment.

During the hearing on the Motion to Suppress in the instant case, Petitioner testified on the

---

Footnote 5, cont'd

take the stand to testify as to the voluntariness of that confession without being subject to cross-examination on the whole case. State v. Lovett, 345 So.2d 1139, 1142 (La. 1977).

Although reversed on other grounds, Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281 (1957), presented essentially the same issue to this Court.

explicit issue of consent to search, since there was no warrant issued to search Petitioner's truck, a fact which the State did not dispute. (H.T., v.I, pp. 23-24 and H.T., v.II, pp. 3-4) As soon as it was established that the search was conducted without a warrant, the burden shifted to the State to prove that the search was conducted under one of the recognized exceptions to the warrant requirement. The State cannot be justified in attempting to meet that burden by eliciting testimony from the Defendant; the burden must be borne by the State by presentation of testimony of its own witnesses.

At such point as the State attempted to elicit testimony from Petitioner as to matters wholly unrelated to the issue of consent, matters which in fact dealt with Petitioner's activities in the State of Louisiana over an extended period of time, Petitioner was entitled to invoke his Fifth Amendment right against self-incrimination as to those matters going beyond the issue of consent. The court below, however, cited its previous decision in State v. Coleman, 254 La. 264, 223 So.2d 402 (1969) in support of its ruling that a trial judge may refuse to

allow a witness to testify if that witness is willing to testify for a limited purpose only. The ruling in Coleman, however, involved an attempt to place a defendant on the stand for testimony of a limited nature during the trial, not during a pre-trial hearing on a Motion to Suppress. A clear distinction can be drawn between considerations of limited cross-examination at a hearing before a judge, where a single issue is at stake -- voluntariness -- and considerations at trial where factual issues of guilt or innocence are in question. State v. Lovett, 345 So.2d 1139, 1145 (La. 1977), Summers, J. dissenting on re-hearing. In an earlier decision by the Supreme Court of Louisiana concerning limited cross-examination of a Defendant, it was held error to require the Defendant to submit to cross-examination on the entire case merely because he had testified earlier before the judge on the single issue of the voluntariness of a confession. State v. Thomas, 208 La. 548, 23 So.2d 212 (1945). Thus, the Supreme Court of Louisiana has consistently refused to require that the Defendant submit himself to a wide-ranging cross-examination about all of his

activities, including those unrelated to the single matter at issue during the hearing or trial or concerning all the issues of the entire case.

It is respectfully submitted that the opinion of the Supreme Court of Louisiana below, in citing Lovett and Thomas as authority for requiring Petitioner to submit to cross-examination as to any issues "relevant" to the hearing,[6] was in error and misconstrued those earlier opinions and others which in fact reflect the Constitutional standard applicable here that, at a pre-trial hearing on a Motion to Suppress, a Defendant has a right to take the stand to dispute the matter of voluntariness and to be subject to cross-examination on that issue and not others. Further, it is respectfully submitted that the ruling of the trial court was in violation of Petitioner's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, because (1) it denied him Due Process to dispute the State's contention as to the issue of

---

6/ The Supreme Court of Louisiana cites Lovett and Thomas at 363 So.2d 661, 663, attached hereto at Appendix A.

consent, (2) it denied him the opportunity to exercise his Fifth Amendment rights, and (3) it inappropriately shifted the burden of proving consent from the State to Petitioner.

As noted supra, the State relied on a traffic violation as the reason for stopping Petitioner, and not probable cause that the vehicle contained contraband. Petitioner did not put at issue, and therefore should not have been required to testify concerning, whether the State had probable cause to arrest him for violating the State's drug laws and to search his vehicle for contraband. The State certainly is entitled to produce testimony in an effort to establish that it had probable cause to search Petitioner's vehicle, but where, as here, Petitioner contended and continues to assert that he was stopped for a traffic violation and that no independent special circumstances existed before the truck was opened that would establish probable cause, [7] the validity of the search of his vehicle hinges on whether or not he consented to the

7/ Sergeant Holcomb, the law enforcement officer who had participated in the pre-arrest surveil-

search, and the State may not thereafter cross-examine him as to probable cause or any other matters without affording him the right against self-incrimination guaranteed by the Fifth Amendment.

Footnote 7 cont'd

lance of Petitioner and others, and who suspected that the truck contained marijuana, neither saw who actually opened Petitioner's truck, nor heard any exchange of words between Petitioner and Lieutenant Wicker at the truck immediately before the truck was opened. Sergeant Holcomb did not arrive at Petitioner's truck until after the vehicle had been opened and the marijuana seen. Lieutenant Wicker, the officer called in by Sergeant Holcomb to follow Petitioner's truck, had been told merely that the Petitioner was suspected of engaging in illicit narcotics activities and that his presence might be required to effect an arrest at some later time. Lieutenant Wicker testified that the reason he pulled Petitioner over to the side of the road was because he had observed Petitioner driving in an erratic and unsafe manner and wished to get him off the road to avoid any possible accidents. (T.T., v.II, p. 6 and H.T., v.II, p. 48). It is undisputed that Lieutenant Wicker's "suspicion" that Petitioner's truck contained marijuana was based on the general information received earlier from Sergeant Holcomb. While Lieutenant Wicker also testified that there were several circumstances regarding Petitioner's truck that made him a little bit suspicious (T.T., v.II, pp. 15-18), those suspicions, absent other special circumstances linking the traffic stop to the subsequent search of Petitioner's truck which yielded the marijuana and resulted in his arrest on the drug charge, cannot be used to validate the warrantless search. (See cases cited at note 3, supra, and accompanying text.)

II. This Court should grant Certiorari to consider whether a consent to a warrantless post-custodial search of a Defendant's vehicle after a traffic stop may be valid if based on the uncorroborated testimony of the State that the Defendant indicated no opposition to the search, and where no evidence was submitted indicating the Defendant was made aware that he did not have to consent to a search.

This Court has recognized that a voluntary consent by a defendant may validate an otherwise illegal warrantless search. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, (1973); Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256, (1946); Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277, (1946). The Supreme Court of Louisiana has likewise held that a warrantless search based on the voluntary consent of the Defendant may be valid and need not be based on probable cause. State v. Angel, 356 So.2d 986 (La. 1978).

As in the decision by this Court in Schneckloth v. Bustamonte, supra, the Constitutional question in the instant case concerns the definition of "consent" in the context of the Fourth and Fourteenth Amendments to the Constitution of the United States.

Also as in Schneckloth v. Bustamonte, supra, Petitioner does not dispute that a search conducted pursuant to a valid consent is Constutionally permissible. The precise issue in this context concerns the burden the State must meet in establishing whether or not the alleged consent by a Defendant was in fact "freely and voluntarily given." See also, Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792 (1968). This Court and the Supreme Court of Louisiana have consistently held that in determining whether the State has met this burden, it is necessary to assess all of the circumstances surrounding the search and alleged consent. Schneckloth v. Bustamonte, supra, at 412 U.S. 218, 227; State v. Andrus, 250 La. 765, 199 So.2d 867, 872-73 (1967). Factors to be taken into account in making such a determination include, among others, the mental state and condition of the defendant, the background of the defendant in terms of education and intelligence, and the presence of any possibility of coercion. Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844 (1958); Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281 (1957); Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, (1948); cited in

Schneckloth v. Bustamonte, supra, at 412 U.S. 218, 227. Importantly, this Court has held that the lack of any advice to the accused of his Constitutional rights regarding protection against a warrantless search is to be considered in determining whether a Defendant's consent was truly voluntary. Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, (1966); cited in Schneckloth v. Bustamonte, supra, at 412 U.S. 218, 227. The Supreme Court of Louisiana, citing Schneckloth v. Bustamonte, has also held that a significant factor in determining whether a Defendant's consent to a warrantless search was in fact voluntarily given is whether the Defendant was warned of his right to refuse. State v. Dunbar, 356 So.2d 956, 961 (La. 1978).

According to the undisputed testimony introduced by the State in the instant case, Petitioner, in response to a query by Lieutenant Wicker after being pulled to the side of the road for a traffic violation, told the law enforcement officer that he was tired, unfamiliar with the roads and lost. (T.T., v.I, pp. 97-98 and H.T., v. II, pp. 48-49, 61-62) The State further concedes that following this explanation by Petitioner, and after Lieutenant

Wicker allegedly asked Petitioner if he had any objection to opening up the back of the truck he did not in any way indicate that Petitioner did not have to allow the officer to open the truck or that Petitioner did not himself have to open it for him. (H.T., v. II, pp. 63-64) In finding that Petitioner voluntarily consented to Lieutenant Wicker's "request" to open the truck, the trial court apparently relied solely on the testimony of Lieutenant Wicker.[8] The testimony given at the hearing on the Motion to Suppress simply does not support this finding even aside from the fact that Petitioner, as noted supra, was not allowed to offer testimony to dispute the State's assertion that he consented to the search.

8/ As noted supra at note 7, Sergeant Holcomb, the officer who had been following Petitioner's truck and who had earlier engaged in surveillance of Petitioner, was not present at the time before or during the opening of the truck, nor did he see directly the door to the truck being opened. (T.T., v.I, pp. 101-103, 108 and H.T., v.II, p. 69) The reference in the opinion below of the Supreme Court of Louisiana to Lieutenant Wicker's testimony being "somewhat corroborated" apparently is a reference to the fact that Sergeant Holcomb was informed after-the-fact of Lieutenant Wicker's version of the search. State v. Lukefahr, 363 So.2d 661, 664, attached hereto as Appendix A.

According to the undisputed testimony offered by the State, the actual opening of the locked truck involved going through a large number of keys which Petitioner allegedly produced. (T.T., v. II, pp. 19-20 and H.T., v. II, pp. 62-63) Furthermore, Lieutenant Wicker stated during direct examination that ". . . we proceeded to open the back of the truck" [emphasis added]. (H.T., v.II, p. 50) Even according to the undisputed testimony offered by the State, it is unclear as to exactly who opened the doors to the truck. The court below was thus left with little more than testimony containing an uncorroborated assertion by Lieutenant Wicker that Petitioner produced a bale of keys and indicated that "he didn't mind" if the Lieutenant looked into the back of the truck which, as it was then determined, contained approximately four thousand pounds of marijuana. This uncorroborated testimony is not clearly supported by the State's evidence, is contrary to common senses, and is specifically denied by Petitioner.

Petitioner respectfully submits that the facts do not in any way reveal a clear and convincing

"bearing of the burden" required of the State in validating a warrantless search. Bumper v. North Carolina, supra at 391 U.S. 543, 548. It is also respectfully submitted that additional undisputed testimony offered by the State, as noted supra, indicated a showing that Petitioner was not reasonably in such a state, given his exhaustion and unfamiliarity with the area, to have consented to the search of a truck containing approximately four thousand pounds of marijuana of his own free will without being overborne in some manner by the words of the armed and uniformed law enforcement officer present or possible actions by the law enforcement officer in presenting to him the "request" to look into the truck. As indicated supra, these are factors which this Court has required be taken into account in determining whether or not a Defendant's will was overborne in a particular case. Schneckloth v. Bustamonte, supra at 412 U.S. 218, 226, 229.

Although this Court has held that failure by law enforcement officers to inform a defendant that he need not consent to a request for a warrantless search will not necessarily invalidate a consent

search, the Court has held that this is one factor to be taken into account in making that determination. Schneckloth v. Bustamonte, supra at 412 U.S. 218, 226. The Supreme Court of Louisiana is in accord with this proposition. State v. Mitchell, 360 So.2d 189, 191 (La. 1978). It is respectfully submitted that, in conjunction with the totality of the circumstances surrounding the search of Petitioner's vehicle as noted supra, the failure on the part of the law enforcement officers to indicate in any way to Petitioner that he was free not to comply with their request to look into the back of the truck was a critical omission that deprived Petitioner of his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and that any consent so obtained did not render valid the warrantless search of Petitioner's vehicle.

This Court's opinion in Schneckloth v. Bustamonte, supra, relied heavily on by the courts below in the instant case, in fact was a narrow ruling not properly applicable to this case. In its concluding paragraph of the decision in Schneckloth v. Bustamonte, for example, this Court declared that:

> "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied." [emphasis added]

At the time Petitioner allegedly consented to the "request" of Lieutenant Wicker to look into the back of the truck, Petitioner had in fact been placed in custody, having been stopped by the Lieutenant, pulled over to the side of the road, asked to get out of his truck, and confronted by a uniformed law enforcement officer who told him he was being arrested for a traffic violation and would have to go into town to post bond. (T.T., v.II, p. 31 and H.T., v. II, p. 49) In contra-distinction, this Court's attention is respectfully directed to Schneckloth v. Bustamonte, supra, at 412 U.S. 218, 220, which stated that in that case "prior to the search no one was threatened with arrest."

It is respectfully submitted, therefore, that the circumstances surrounding the warrantless search of Petitioner's vehicle in the instant case are

more akin to those cases involving post-custodial statements by a Defendant, in which this Court has consistently held that the Constitution requires certain now-familiar warnings as a prerequisite to the elicitation of information, than to the circumstances of cases such as Schneckloth v. Bustamonte, supra, involving pre-custodial elicitation of consent to search. This Court has found that post-custodial elicitation of information by law enforcement officers is "inherently coercive" and that detailed warnings as to a Defendant's right to deny information are required. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, (1966). This Court recognized the distinction in Schneckloth v. Bustamonte, declaring, at note 36, 412 U.S. 218, 247:

> "As noted above, supra, note 29, the present case does not require a determination of what effect custodial conditions might have on a search authorized solely by an alleged consent." [emphasis added]

The facts and issues raised by this case, concerning Fourth Amendment questions relating to a warrantless search, and Fifth Amendment considerations involving alleged acts by Petitioner in the nature of self-incrimination, in the words of Mr. Justice Blackmun, lie "at the crossroads of the

Fourth and Fifth Amendments." Brown v. Illinois, 422 U.S. 590, 591, 95 S.Ct. 2254, 2256, (1975). As noted in this Court's opinion in Schneckloth v. Bustamonte, supra at 412 U.S. 218, 236-38, there are distinctions between Fourth, Fifth and Sixth Amendment considerations in the context of consentual elicitation of information from a Defendant. In the instant case, where the State presented uncorroborated evidence that Petitioner consented to a warrantless search, and in which Petitioner was, as noted supra, effectively precluded from disputing that testimony, the violation of Petitioner's Fourth Amendment rights -- a "pre-trial" concern -- bears directly on his right to a fair trial. There is, in other words, a direct and necessary interrelationship between the issue of consent to a warrantless search and protection of Petitioner's right to the processes of a fair trial which necessarily touches on the Defendant's right to offer testimony.

Petitioner does not request, nor would he seek to require that this Court be faced with the decision of requiring "detailed warnings" before any consent search could be validly conducted. Rather, Petitioner respectfully submits that the failure of the

State to take any affirmative steps whatsoever in presenting to Petitioner that he had any choice in responding to the "request" to open the truck, once he had been placed in custody, in conjunction with the other circumstances surrounding the search and the presence of marijuana in the truck, does not and should not afford the State the basis on which to validate an otherwise invalid warrantless search. This position is buttressed by the fact, as discussed supra, that Petitioner was effectively denied the opportunity to testify in opposition to the State's contention that he consented to the search.

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted to review the judgment and opinion of the Supreme Court of Louisiana.

Respectfully submitted,

LAW OFFICES OF EDWIN MARGER

BY: _____
EDWIN MARGER

BY: _____
ROBERT L. BARR, JR.

ATTORNEYS FOR PETITIONER

APPENDIX A

State of Louisiana v. Lukefahr,
363 So.2d 661 (La. 1978)

(363 So.2d 661)

STATE of Louisiana, Appellee,

v.

Thomas P. LUKEFAHR, Appellant.

No. 61849.

Supreme Court of Louisiana

October 9, 1978

Rehearing Denied Nov. 9, 1978

Defendant was convicted in the Criminal District Court, Parish of Washington, Hillary J. Crain, J., of possession of marijuana with intent to distribute and was sentenced to ten years at hard labor and fined $15,000 and he appealed. The Supreme Court, Tate, J., held that: (1) valid ground for recusal of judge was not stated; (2) trial court did not abuse its discretion in not allowing defendant to testify at suppression hearing for limited purposes; (3) physical evidence seized pursuant to consent search was admissible; (4) denial of pretrial discovery was not an abuse of discretion; (5) evidence concerning defendant's use of an alias was admissible; (6) trial judge did not abuse his discretion in denying continuance; (7) evidence concerning surveillance of defendant on morning of arrest was admissible, and (8) imposition of additional year's imprisonment if defendant failed to pay fine, in addition to maximum ten years' imprisonment, was not illegal.

Affirmed.

(363 So.2d 663)

Ferdinand J. Kleppner, Grisbaum & Kleppner, Metairie, Edwin Marger, Atlanta, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Woodrow W. Erwin, Dist. Atty., Julian J. Rodrigue, First Asst. Dist. Atty., Abbott J. Reeves, Asst. Dist. Atty., Research and Appeal Division, for plaintiff-appellee.

TATE, Justice.

The defendant Lukefahr was convicted of possession of marijuana with intent to distribute in violation of La. R.S. 40:966(A)(1), and he was sentenced to serve ten years at hard labor and fined $15,000.

On his appeal, the defendant filed 74 assignments of error. They principally concern: (1) a motion to recuse the trial judge; (2) the hearing and denial of a motion to suppress physical evidence; (3) the denial of pre-trial discovery; (4) objection to evidence concerning the defendant's use of an alias; (5) evidence and references concerning the defendant's participation in other crimes than that with which charged; and (6) an allegedly illegal sentence.

1. Motion to Recuse

The defendant argues error in the denial of motion for recusal of the trial judge and in the failure to refer it to another judge for a hearing (Assignments 1 and 2).

The defendant grounded his motion on allegations that the trial judge was biased and prejudiced, because in pre-trial conference he stated there would be no continuance, and because at the bond reduction hearing he admitted evidence pertaining to the guilt or innocence of the defendant.

A motion to recuse a trial judge must be based on more than mere general conclusory allegations. State v. Bell, 346 So.2d 1090 (La. 1977); State v. Maduell, 326 So.2d 820 (La. 1976); State v. Collins, 288 So.2d 602 (La. 1974). If the motion, on its face, does not show grounds to recuse even if the allegations are proved, the trial judge may overrule the motion without referring it to another judge. La.C.Cr.P. art. 674; State v. Bell, and State v. Collins, cited above.

Here, the trial judge's alleged statement about continuance did not indicate any bias or prejudice against the accused. His handling of the bail reduction hearing was in accordance with law. Further, the judge's rulings on these matters, even if improper on their merits (and no impropriety is shown), may be attacked directly by assigning error to the rulings themselves, but do not state a valid ground for recusal as alleged (or explained, Tr. II, 3-5).

2. The Motion to Suppress Physical Evidence.

The defendant is prosecuted for possession of a large quantity of marijuana found in his truck, after he was stopped for a traffic violation. His motion to suppress is based upon the alleged warrantless search and seizure without probable cause.

Several contentions are raised concerning the hearing upon and the denial of the motion.

A. At the hearing on the motion, the defendant attempted to testify for limited purposes. He wished to deny consent to the search or any traffic violation justifying the police to stop him on the highway, but he desired to assert his non-incrimination privilege against all other questioning. His assignments 3, 4, and 7 complain of the trial court's refusal to let him do so.

A defendant who testifies in a pre-trial suppression hearing is subject to cross-examination as to all issues relevant to such hearing, although not to cross-examination on the entire case. State v. Lovett, 345 So.2d 1139, 1142 (La. 1977); State v. Thomas, 208 La. 548, 23 So. 2d 212 (1945); cf., La. R.S. 15:280 (1950). The evidence taken at such hearing is not admissible at the trial of innocence or guilt (the merit trial).

In its exercise of its control of the proceedings before it, La.C.Cr.P. art.17, the trial judge may refuse to let a witness testify who, contrary to law, is willing to

testify for a limited purpose only. State v. Coleman, 254 La. 264, 223 So.2d 402 (1969).

An issue at the motion was whether there was probable cause for a warrantless search. The state intended to cross-examine the defendant, as the colloquy shows, on events relevant to probable cause beyond those immediately concomitant with the stop and search. If defendant's counsel feared a fishing expedition, as he claimed, his remedy (if he wished defendant to testify at the hearing) was to object to questions if irrelevant to the hearing's issues, not to offer the defendant as a witness for restricted purposes only.

Under the circumstances shown, we find no abuse of discretion in the trial court's ruling.

B. The defendant complains of the trial court's refusal to suppress the marijuana seized and its admission into evidence of samples and photographs of it. (Assignments 13, 60, 68).

To uphold the trial court's ruling, we need not reach the question whether there was probable cause, nor whether exigent circumstances justified the warrantless search, since there were facts in the record from which the trial judge could fairly conclude that the defendant had consented to the search.

Lieutenant Wicker testified that while he had the defendant under observation, the defendant drove his truck across the center line of the highway, forcing another motorist off the traveled portion of the road. (This uncontradicted testimony was corroborated by another officer.) Wicker hailed the truck to the side of the road, and upon seeing that defendant had a Florida driver's license, "wired-on" Florida license plates, and a decal with a Baton Rouge address on the door, asked him whose truck it was.

Wicker testified that the defendant said he didn't know whose truck it was, that a man at a

truck stop had paid him a hundred dollars to drive it somewhere and that he knew nothing about its contents. Wicker testified that he then asked if defendant minded opening up the back of the truck; defendant said; "No, I don't mind," and produced the keys and opened the back end of the truck.

Another police officer present somewhat corroborated this latter testimony. Although it was the defendant's apparent purpose to deny this version, it is otherwise uncontradicted.

Under these circumstances, indicating a genuine and voluntary consent, it is not determinative whether probable cause existed for the search or whether the defendant had been warned of his right to refuse to permit the search. Schneckloth v. Bustamonte, 412 U.S. 218, 93 .Ct. 2041, 36 L.Ed. 2d 854 (1973). The evidence shows a valid stop for a traffic violation; under the undisputed evidence, there is no substantial factual issue as to a coerced consent through exploitation of a traffic arrest (whether valid or invalid).

C. The defendant complains of various evidentiary rulings at the hearing on the motion to suppress. Assignments 5, 6, 8, 9, 10, 11, and 12. We have examined these rulings and find no error.

3. Denial of Pre-Trial Discovery

Assignments 14-32 concern attempts by the defendant to secure pre-trial discovery of details of the state's case by an application for a bill of particulars, by a motion for oyer, and by a motion to permit defense inspection of state files. At the time of the trial, the denial of such discovery was within the discretion of the trial court. See trial court's rulings, Tr. II, 126-40.

4. Reference to Alias Used by the Defendant

At the time the defendant was arrested, he

was bearing a driver's license in the name of Thomas James Davidson, by which name he identified himself when he was arrested. By motions and a series of objections (Assignment Nos. 34, 35, 43, 46, 52, 54 and 64), the defendant sought to prevent testimony as to this alias, allegedly because the evidence was prejudicial and

suggested the defendant to be of criminal characteristics. The objections to the evidence concerning this circumstance of the arrest are patently without merit, and no pertinent authority is cited in support of these assignments.

5. Evidence Concerning the Defendant's Participation in Other Crimes

The defendant was arrested in Washington Parish on February 22, 1977, and charged with the possession of a large amount of marijuana with intent to distribute it. Earlier that morning, the defendant had driven his van truck from Livingston Parish to a location in Washington Parish, where it received a load (apparently the marijuana). On April 27, four days before the trial, the district attorney gave a written notice to the defendant that, for purposes of proving the accused's guilty knowledge and specific intent, the state intended to introduce evidence of marijuana activities at the Livingston Parish location from which the defendant had started that morning.

Several assignments are based upon this other-crime evidence.

A. By Assignment 37, the defendant complains that he was not granted a continuance to prepare a defense against the Prieur evidence.

In State v. Prieur, 277 So.2d 126, 130 (La. 1974), we stated that "[t]he State shall within a reasonable time before trial furnish in writing to the defendant a statement of the acts or offenses it intends to offer, describing same with the general particularity required of an indictment or information. No such notice is required as to evidence of offenses which are a part of the res gestae, or convictions used to impeach defendant's testimony." In State v. Tenant, 352 So.2d 629 (La. 1977), we held that notice of intent to use other crimes given six days prior to trial was ample.

The granting of a continuance is a matter within the discretion of the trial judge. State v. Williams, 262 La. 317, 263 So.2d 306 (1972). Here defense counsel merely complains of insufficient time to prepare, without alleging specific facts to show prejudice to the defendant. On this bare allegation, we cannot conclude that the trial judge abused his discretion. (The implication from the pre-trial hearings is that the defendant was aware that this interrelated evidence might be introduced.)

B. By Assignments 39, 40, 41, 44, 48, and 50, the defendant objected to any evidence concerning the surveillance of the defendant in Livingston Parish on the morning of his arrest, as well as of his earlier stop in Washington Parish where he picked up his present load. Even if considered "other crime" evidence rather than part of a continuous crime, the evidence was relevant to proof of the specific intent and guilty knowledge requisite to part of the crime charged, and its probative value exceeded its prejudicial effect:

The state did not, for instance, introduce evidence of extensive activities at the Livingston location independent of the present offense. A state witness did allude briefly to the reason for the surveillance (suspicion of criminal activity, based upon certain objective facts) of the Livingston location from which the accused started that morning; but, in the main, the state's evidence of the antecedent marijuana activity was limited to the

morning of the arrest and the incidents leading up to it.

Prieur does not, as the defendant contends, require a pre-trial evidentiary hearing as to whether extraneous other-crime evidence may be admitted. It only requires that, before such evidence is introduced, the trial court must determine, on the basis of the showing requisite for it to do so at a hearing outside the presence of the jury, that the extraneous acts are probative of a real issue and that their probative value exceeds their prejudicial effect.

6. Other Assignments

Assignments 49, 53, 55, 56, 58, 59, 61, 62, 63, 65, 67, 68, and 71 complain of testimony of state witnesses, admitted over objection, which is alleged to be irrelevant or inflam-

matory, Assignment 70 complains of a failure to strike an allegedly prejudicial and improper question by the prosecutor. Assignment 66 complains of a leading question asked by the state of its own witness. Assignment 72 complains of a failure to grant a mistrial when the state in closing argument made a comment allegedly improper.

We have examined these contentions and find no reversible merit to any of them. Nor is there merit to Assignment 73, complaining of the denial of a motion for a new trial based on the alleged errors which are the basis for the assignments of error.

Assignments 33, 36, 38, 42, 45, 47, 51 and 57 are not argued and are deemed abandoned.

7. The Allegedly Illegal Sentence

By this assignment 74, the defendant questions the legality of sentence imposed upon him; namely, the imposition of an additional year's imprisonment if he fails to pay the fine of fifteen thousand dollars imposed upon him, in addition to the maximum ten-years imprisonment.

La. R.S. 40:966(B)(2) provides that, for conviction of possession with intent to distribute marijuana (40:966(A)(1)), a person shall be sentenced "to a term of imprisonment at hard labor for not more than ten years and pay a fine of not more than fifteen thousand dollars."

The defendant complains that the sentence is illegal, since if he fails to pay the fine he is subject to a term of eleven years at hard labor, one year more than the statutory maximum.

In the case of an indigent defendant, it is impermissible to impose a prison term in lieu of fine payment that would result in the defendant's serving a longer term than the statutory maximum for the offense. State v. Williams, 288 So.2d 391 (La. 1974); Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). However, there is nothing in the record to suggest that this defendant is indigent; if he is, of course, upon appropriate motion and hearing the additional imprisonment may be avoided. See Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971).

The extra prison term of one year in lieu of payment of fine is expressly authorized by La.C. Cr.P. art. 884: "If a sentence imposed includes a fine or costs, the sentence shall provide that in default of payment thereof the defendant shall be imprisoned for a specified period not to exceed one year * * *"

This article must be read together with La.R.S. 40:966 to establish the statutorily possible maximum penalty, where no special circumstances such as indigency are present.

(363 So.2d 666, cont'd)

By brief, the defendant also seeks review of his sentence on the ground that it was excessive under the circumstances. However, in addition to absence of an assignment on the issue, no formal objection to the sentence was lodged at the time of sentencing, and appeal therefrom on the ground of excessiveness under the circumstances is foreclosed. State v. Williams, 340 So.2d 1382 (La. 1976).

Decree

For the reasons assigned, therefore, the conviction and sentence are affirmed.

AFFIRMED.

Appendix B - Pages from Trial and Hearing Transcripts cited In Petition

Transcript of Hearing on Motion to Suppress

V.I

MR. UNSWORTH:

Thank you.

THE COURT:

Who are your witnesses?

MR. MARGER:

Mr. Wayne McElvane (sic). He's right there. Mr. McElvane.

THE COURT:

Will that be your only witness?

MR. MARGER:

Well, Jerry Lukefahr is a witness, but not on the Motion to Suppress, Your Honor. He is only a witness.

THE COURT:

Well, if I am going to sequester, I am going to sequester on all motions, because I might be able to take some of the evidence and use it in the others.

MR. MARGER:

I understand. There is no problem. Mr. Lukefahr.

THE COURT:

Okay. All of you gentlemen are advised that you are to leave the courtroom. You are not to return to the courtroom while any evidence is being taken, and you are not to discuss your testimony with any of the other witnesses.

(Whereupon, the witnesses were sequestered.)

THE COURT:

Okay. You may proceed.

MR UNSWORTH:

Thank you, Your Honor.

Tom Lukefahr, please.

MR. GILLASPY:

Which motion are we hearing first?

THE DEPUTY CLERK OF COURT:

The Motion to Suppress.

THOMAS P. LUKEFAHR,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. UNSWORTH:

Q State your name for the record, please.

A. Tom Paul Lukefahr.

Q. Mr. Lukefahr, on February 22, 1977, did you have occasion to be stopped and arrested by members of the Louisiana State Police?

A. I did.

Q. Did they have an arrest warrant for your person?

A. I was shown no warrant, and I know of nothing that is in existence.

Q. Did they have a search warrant for the vehicle that you were driving?

A. I was shown none.

Q. Did you give any members of any police department, more specifically the two members of the Louisiana State Police that stopped you, permission to search either your person or the vehicle that you were driving?

A. No, sir, I did not.

MR. UNSWORTH:

No further questions. Answer the questions of the District Attorney, please. H.T.,v.I, 25

MR. GILLASPY:

Your Honor, since this involves a Motion to Suppress where a vehicle was involved, we could well have the issue as to whether probable cause existed, and that issue is in fact raised by the motion. I wish to go into the facts with Mr. Lukefahr, as with any other witness, which would purport to show probable cause.

THE COURT:

Proceed.

CROSS EXAMINATION

BY MR. GILLASPY:

Q. Mr. Lukefahr, how old are you, sir?

A. 33.

Q. What is your permanent address?

A. My permanent address is General Delivery, White Lake, Wisconsin.

Q. All right, sir. Do you know that zip code?

A. 54491.

Q. Now, how long have you been in Louisiana?

MR. MARGER: H.T., v.I, 26

Objection, Your Honor, irrelevant as relates to search and seizure of Mr. Lukefahr's vehicle.

MR. GILLASPY:

He has taken the stand voluntarily as a witness on a Motion to Suppress, which on its face states there was no probable cause. I propose with this witness, as with any other -- and he is subject to the same rules of cross examination -- to show background which establishes probable cause.

MR. UNSWORTH:

May it please the Court, Mr. Lukefahr is here to testify on a Motion to Suppress as relates to the incidents surrounding the search of the vehicle, which we

are attempting to suppress, at the time. Any other information the District Attorney wishes to gather from Mr. Lukefahr, I would submit to the Court, would be simply a fishing expedition that has absolutely nothing to do with the Motion to Suppress. H.T., v.I,27

THE COURT:

Well, I can't really tell yet. If he's trying to do it to show probable cause now, that it will be to show probable cause, for that purpose only I will allow the question to go forward.

BY MR. GILLASPY:

Q How long have you been in Louisiana?

MR. MARGER:

Now I have to --

THE COURT:

You gentlemen are going to have to decide who is going to make the objection. I am not going to have both of you jumping up and down. You can alternate on witnesses as far as the cross examination is concerned, but when one person handles the witnesses I want that person handling that only. I don't want both counsel jumping up and asking questions for the same thing. H.T.,v.I 28

MR. UNSWORTH:

Your Honor, at this time I would have no recourse but to advise the client to assert his rights against self incrimination.

MR. GILLASPY:

He cannot pick and choose. Once he takes the stand to testify in facts involving this motion, he cannot pick and choose and answer those that are palatable and refuse to answer those that make him uncomfortable.

THE COURT:

It is my understanding that testimony on a Motion to Suppress, the testimony given by the Defendant on a Motion to Suppress, is not admissible at a trial itself; is that correct?

MR. UNSWORTH:

That is correct, Your Honor. But additionally, Your Honor, unless he would take the stand and then deny that testimony, that is correct. H.T., v.I,29

However, additionally, it is my understanding of the rules of evidence with regard to a Motion to Suppress, whether it be physical evidence or suppression of profession. For instance, if the Court is only directing his attention towards whether it was an illegal search or seizure or an illegal confession, not towards guilt or innocence. And questions directed towards guilt or innocence are not

admissible at a Motion to Suppress.

THE COURT:

Except probable cause that a crime has been committed are admissible on a Motion to Suppress.

MR. UNSWORTH:

I understand that, Your Honor. But again, how far do we extend probable cause? Mr. Lukefahr has --

H.T., v.I,30

THE COURT:

Certainly we can extend it to find out the occurrences that were happening to give the police probable cause to make the search.

MR. UNSWORTH:

With regards to the question, "How long have you been in Louisiana," Your Honor, I submit that that is a broad, vague, general question which directs itself to a fishing expedition and not towards the Motion to Suppress.

THE COURT:

All right. Just give me, for the Court's own purpose, just tell me what you intend to show, Mr. Gillaspy, so I can make that determination.

MR. GILLASPY:

I intend to show the defendant, during

the months and days and hours immediately prior to this arrest, which activities will be confirmed by police officers, which gave those officers probable cause, the pattern of activities, the scheme, the system, the accumulation of activities which gave them probable cause to make this arrest and search.

Had this witness not taken the stand, I would have brought out the same facts through police officers, and I probably will bring them out additionally. But I have a right to ask this witness any question relating to probable cause. He took the stand.

MR. UNSWORTH:

Your Honor, I can only submit to the Court that a copy of an allegation made and a copy of the search warrant submitted in another parish related to this particular incicent. In that allegation it contained the fact that their probable cause consisted of a traffic ticket combined with an alleged consent search, that probable cause to get a search warrant surrounding the incident involving Thomas Lukefahr did not go any further than that.

H.T., v.I,32

MR. GILLASPY:

We are not basing this on a search warrant.

THE COURT:

That is, though, probable cause to make a warrant, necessarily --

MR. UNSWORTH:

I am trying to give the Court some information and some background regarding this particular Motion to Suppress, which this Court may not have in front of it, since it is in another parish.

MR. GILLASPY:

Well, I do not rely on a traffic ticket or violation in this incident for the search. It may be pertinent to the initial stop, but I don't think it is pertinent to the search. I am not familiar with the affidavit, although I think I might have seen it one time that your talking about. H.T., v.I,33

THE COURT:

Well, I am going to overrule your objection. What are you going to do with reference to your witness?

MR. UNSWORTH:

Your Honor, with regard to that particular question asked by the District Attorney?

THE COURT:

He is not going to take the Fifth Amendment with reference to a particular question. He is going to take it for all of them or he is going to take it for none.

MR. UNSWORTH: H.T.,v.I, 34

To that ruling, for the record, Your Honor, we would respectfully object, and we have no choice, Your Honor, certainly if he has to take it for that one, and it is Your Honor's ruling that he must take it for all questions.

THE COURT:

I don't think that there is any law that says you can selectively take the Fifth Amendment and answer what you want to and not answer what you want to.

MR. UNSWORTH:

I understand Your Honor's position, and I have no recourse but to instruct my client to take the Fifth Amendment.

MR. GILLASPY:

I think it has gone too far. He has already testified.

THE COURT:

Well, if he is going to take that, I am going to direct that the record be expunged. H.T., v.I, 35

MR. UNSWORTH:

Excuse me. That is the ruling of the Court?

THE COURT:

That is the ruling of the Court.

MR. UNSWORTH:

To which ruling of the Court we respectfully object, and I would request that, strictly for appellate purposes, Your Honor, that that which you have ordered expunged from the record be available for appellate purposes so the Court would have something to consider.

THE COURT:

Okay. It is still your motion to go forward with it?

MR. UNSWORTH:

I understand that, Your Honor.

Wayne McElvane.

MR. GILLASPY:

Your Honor, for the record, may I insert an objection to the instruction given by the counsel H.T., to his client and to the Court's v.I,36 ruling in accordance therewith as being my expressed position that under the rules of evidence in the Code of Criminal Procedure I should have the right of cross examination in full as to all matters bearing upon probable cause.

MR. UNSWORTH:

Excuse me. Mr. McElvane. I called the witness out of order. I call Officer Johnny Holcomb, please.

(The testimony of Johnny Holcomb, having been previously transcribed, is omitted from this transcription.)

AFTERNOON SESSION H.T., v.I, 37

1:30 p.m.

THE COURT:

The Court will come to order.

MR. MARGER:

We would like to call Vertrees Adams, Your Honor.

MR. GILLASPY:

He was not subpoenaed, as far as we know. We believe he is in Lake Charles.

MR. MARGER:

I'm sorry, Your Honor. We thought he had been subpoenaed. We thought he was outside.

Your Honor, at this time we would like to proffer into the record further testimony of Mr. Thomas Lukefahr, the defendant herein, and --

MR. GILLASPY:

Then I would like to proffer cross examination of him.

THE COURT:

I am not going to allow anybody to take the stand and give whatever they want to give and then not be subject to cross examination, and I don't know of any proffer to be made in a criminal case as such. If he takes the stand, that is fine, but he cannot selectively take the Fifth Amendment. If he takes the stand and takes the Fifth Amendment on all of it, that's fine, but I'm not going piecemeal. H.T., v.I,38

MR. MARGER:

May I make a statement for the record, Your Honor?

THE COURT:

Yes.

MR. MARGER:

The purpose of the testimony which we make a proffer on, and the purpose of the testimony made by Mr. Lukefahr given in the prior situation, was based on the events that happened at the time of the arrest and search and seizure. It is the position of the defense, Your Honor, that anything related to that time and place is admissible for the purpose of examination and cross examination. Our taking of the Fifth Amendment, Your Honor, was not meant to keep the Court from cross examining as to events H.T., v.I,39

that took place in regard to the search and seizure, and I believe that Your Honor, based on the testimony of Sergeant Holcomb, whose testimony was the reason that he was stopped was for a traffic offense, not to allow testimony as to whether or not any such traffic offense took place, not to allow testimony as to either on direct or rebuttal, if there is defense testimony, not to allow testimony as to whether or not in fact he opened or permitted Lieutenant Wicker to open the truck is prohibiting him from testifying in his own defense, with the understanding that any cross examination or any testimony dealing with any of the other facts of the purposed crime other than the search at that time, based now on the testimony of the officer that the arrest was occasioned by a traffic violation, would be depriving him of his rights. H.T., v.I,40

THE COURT:

The State has the burden, No. 1, a search. First of all they have to prove probable cause and, secondly, they have to prove exigent circumstances. Now what you are asking them to do is to testify only to exigent circumstances and leave out probable cause. Now, I'm not going to do that. I'm not telling him he cannot testify. If he wants to testify to any evidence that is relevant to H.T., v.I,41

the question of those two conditions which are necessary for a warrant to search, then let him take the stand and testify to them. But I'm telling you I'm going to allow the State to show these two elements. And, in my opinion, probable cause could probably stem from events that have occurred prior to the time that the actual stopping took place.

MR. MARGER:

Thank you, Your Honor. We rest at this time, Your Honor, with regard to this motion.

MR. GILLASPY:

Mr. Carver, Agent Carver.

LARRY T. CARVER,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GILLASPY:

Q Your Name, please, sir. H.T.,v.I,42

A Larry T. Carver.

Q How do you spell your last name?

A C-a-r-v-e-r.

Q By whom are you employed?

A Federal Drug Enforcement Administration.

Transcript of
Hearing on Motion to
Suppress

V.II

P R O C E E D I N G S

(Testimony of witnesses excerpted from the transcript of the above-entitled cause.)

JOHNNY HOLCOMB,

a witness in the above-entitled cause, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARGER:

Q Will you state your name, please, sir?

A Sergeant Johnny Holcomb.

Q What is your address, Mr. Holcomb?

A I work for the State of Louisiana, Department of Public Safety, Division of State Police.

Q Did you cause to be arrested the Defendant Thomas Lukefahr?

A This fellow here, yes, sir.

Q On what date?

A 22nd of February 1977.

Q On that particular date, Sergeant, did you have a warrant for his arrest?

A No, I did not.

Q Did you have a search warrant for the

vehicle in question?

A No sir, I did not.

Q Did you have a search warrant for his person?

A No, sir, I did not.

Q Did you have an opportunity to procure a warrant for his arrest?

A Yes, sir.

Q Did you have an opportunity to procure a search warrant for the vehicle?

A Yes, sir.

Q Did you have an opportunity to procure a search warrant for his person?

A Yes, sir. And I base these last "yes" answers on after-the-fact, after he was arrested by a uniformed officer for another violation.

Q Who was the uniformed officer that arrested him?

A Lieutenant W. T. Wicker, State Police, Covington.

Q And what was the reason for Mr. Wicker's arrest of Mr. Lukefahr?

A Mr. Lukefahr drove his truck across the center line of the highway and

forced another vehicle off the

highway onto the shoulder.

Q How did this State Trooper -- what is his name again, please, sir?

A Lieutenant Wicker.

Q Lieutenant Wicker is a uniformed State trooper?

A Yes, sir, that's correct.

Q And his normal duty is surveilling traffic in Washington Parish?

A Troop L area encompasses four parishes. One of them is Washington.

Q And he's on the Traffic Division?

A Yes, sir.

Q And he was on the Traffic Division the date of the arrest?

A Yes, sir.

Q On what date was that, sir?

A It was the early morning hours of February 22, 1977.

Q Approximately what time?

A In what occurrence? What time?

Q The time that Mr. Lukefahr was arrested?

A About 7:00 a.m., 7:10 a.m.

Q Now, when the lieutenant arrested him for

Q Isn't it a fact that you actually had a trooper under your supervision and direction watching the loading of that truck?

A That is correct.

Q Didn't that trooper know what was being loaded at that time?

A I'd rather the trooper himself would answer that.

Q Is he here?

A Yes, he is.

Q What is his name?

A Trooper Robert Thomasson.

Q Now, did you discuss either over your police radio or otherwise with Trooper Thomasson the loading of that truck with marijuana prior to the arrest of Mr. Thomas Lukefahr?

A Yes, sir, we talked about it.

Q How many hours was that, sir, before the time of the arrest?

A It couldn't have been more than an hour. It was shortly before daylight, and Tom drove away from the farm at about daylight or right before.

Q Now, based on your knowledge and from information gathered by people under your specific direction and

control, do you know at what time the truck was loaded?

A I didn't make a note of the time. Trooper Thomasson, I think, has that in his mind or in his report.

Q Did it take some time to load the truck?

A There, again, I don't know, because I don't know how long it took Thomasson to get into position, and I don't know how long he was there watching.

Q Now, as a matter of fact, isn't it true that the reason Thomas Lukefahr was stopped was because of your suspicion of the contents of the truck, based on your knowledge from Mr. Thomasson and others rather than because of a ticket for crossing a white line?

A No, sir, that is not true. I had reason to believe that Thomas Lukefahr's truck contained contraband, but I was more concerned with his final

H.T.,v.II,17

destination. And when he ran across the center line and almost hit the car a uniformed trooper radioed me, "I'm going to stop him before he has a wreck." And I started to object, but I said, "Well, go ahead. That's a good reason to stop him."

Q So, actually, the lieutenant had no idea that there was anything in that truck that might have been contraband?

MR. GILLASPY:

Objection to the leading question.

A I don't know what the lieutenant referred to during the conversation.

THE COURT:

Sustained.

BY MR. MARGER:

Q Now, Sergeant, in the event that there were no ticket and no white line, would you have ordered the stoppage of that truck under any conditions?

A I would not.

Q At any point?

A Not until I had probable cause to stop him.

H.T.,v.II,18

Q So that the following of the truck was for the purpose of obtaining the probable cause to stop the truck?

MR. GILLASPY:

I'm going to object to these consistent leading questions. Don't answer the question, please, sir.

THE COURT:

Yes, it is leading.

BY MR. MARGER:

Q In the event that the truck had not committed any minor traffic offenses of any kind, would you have ever have stopped the truck?

A I just stated I would not stop the truck nor have the truck stopped without probable cause.

Q Was there anything else that would have given you probable cause other than a traffic violation?

A I can't foresee what's going to happen.

MR. GILLASPY:

I'm going to object to that as calling for a conclusion. We

A Yes, sir.

Q What did you see it do?

A I was proceeding west on LA-10, and somewhere ahead of me was Sergeant Holcomb.

Q Were you in touch with Holcomb at all times on the radio?

A Yes, sir, by radio. And he advised me that the truck pulled over and turned off his lights as he rounded a curve on LA-10. I headed on out LA-10, and I over took a truck that had his lights on at the time and travelling about 30 miles and hour going west on LA-10. I followed it for a little ways, and the truck was driving in an erratic manner. The dual wheels on the rear end kept hitting the center line, crossing the center line. At one point there it got across the center line, a lady in a black car -- some General Motors product, either a Pontiac or Chevrolet -- came by, and her right side of the car had to get off of

the travelled portion of the road onto the shoulder to keep from hitting this truck. It was headed east.

Q At that point what did you decide that you had to do, if anything?

A I thought the truck was driving in such

an erratic manner the best thing for me to do would be to stop it and get it off the road.

Q Did you convey that to Holcomb?

A I sure did, yes, sir.

Q After you had stopped the truck, what contact, if any, did you have with Mr. Lukefahr, who is sitting here?

A I talked to the driver, and he handed me a Florida driver's license. The truck was bearing Florida license plates. The truck had a seafood decal with a Baton Rouge address on the door. The driver's license was Mr. Thomas Davidson.

I advised Mr. Davidson that he had drove left of center, almost causing a woman to have an accident. And he

H.T.,v.II,49

said, "Well, I'm not familiar with the road. I'm trying to find an intersection up here." And he said, "I may have crossed the center line." He said, "I'm having trouble with the truck."

Q Now, after Holcomb got there, did you say anything to him with regard to looking in the truck?

A I advised him that I was going to cite him for driving left of center and that would mean going back to Franklinton, posting bond.

And as I noticed these license plates wired on and the Baton Rouge address on the driver's side of the door of the cab, I asked him whose truck it was, and he said he didn't know whose truck it was. I said, "What do you mean you don't know whose truck it was?" He said, "A man at the Union 76 Truck Stop in Slidell paid me a hundred dollars to drive this truck from Slidell to Rick's Body Shop in Amite." He said,

H.T.,v.II,50

"That's all I know about it." I said, "What's in it?" He said, "I don't know." I said, "Well, do you mind opening the truck and let's see?" He said, "No, I don't mind."

He produced a bundle of keys and some more keys, and then we proceeded to open the back end of the truck.

Q Now, Holcomb had acquainted you just previously with the fact that this was a drug investigation, had he not, sir?

A Yes, sir.

Q And when this man told you that he'd been paid a hundred dollars to drive the truck the night before, did you know from what Holcomb told you that that was untrue?

A Yes, sir.

Q When he opened the truck, what did you see?

A Well, I saw some big bales. I really didn't know what it was. That's when Sergeant Holcomb stepped forward.

H.T.,v.II,51

MR. GILLASPY:

Would you answer counsel's questions?

THE WITNESS:

Yes, sir.

MR. MARGER:

If the Court please.

CROSS EXAMINATION

BY MR. MARGER:

Q Lieutenant, at what time on the night of the 21st of February did Sergeant Holcomb tell you that this was a drug investigation, a narcotics investigation?

A Around 4:00 a.m., or a little after.

Q Is that the time when he first called you?

A No, sir. When he first called me I was in Slidell, and that was somewhere between 3:00 and 4:00. I'm not sure of the time.

Q Now, at that time, did Sergeant Holcomb indicate to you that he needed you for an arrest?

A He indicated that they may make a raid and they needed a uniformed officer

A As I turned on my red light and siren the truck slowed down, so I realized that he was going to stop, but he went a good ways. Well, he went on past the intersection of LA-10 and 440, and he went onto 440 about 200 yards kind of uphill, and he got it off on the shoulder as much as possible and stopped.

Q Now, at the time that that happened, did you know before getting out of your vehicle that there was anything in that truck?

A Did I know first-hand?

Q Yes.

A No, sir.

Q Had anybody told you what was in the truck?

A Had anybody?

Q Had anybody told you?

A What was in the --

Q What was in the truck.

A No, sir.

Q Sergeant Holcomb had not discussed that there was marijuana in that truck?

A They had discussed the possibility of marijuana being in that truck.

Q As a matter of fact, sir, didn't Sergeant Holcomb tell you that there was marijuana in that truck?

A No, sir.

Q You had no idea as to what was in the truck?

A I had an idea. I didn't know definitely. No one had said, "That truck contains marijuana."

Q But you did not stop the truck because there was marijuana in it?

A No, sir, not at that time I didn't.

Q Then what happened?

A The driver stepped out of the truck, walked back to me and handed me a Florida driver's license with Thomas C. Davidson on it, which was this man right here.

Q He stepped out without your asking him to, or anything else?

A That's all. Come back to the rear of the vehicle.

Q Was he belligerent?

A No, sir.

Q What happened then?

A He said he was tired, he was beat, and all this business. And he needed a shave. His hair was a little longer, but he was, you know, as

nice as he could be.

And we walked up, looked at the front of the truck. That's when I saw the "Trophy Seafood, Baton Rouge, Louisiana," on the driver's door. I asked him about the -- well, first I advised him that he had almost caused a lady to have an accident and I was going to issue him a traffic citation for that, and then I asked him about the Baton Rouge address and the Florida license and the fact that the license plate was wired on the vehicle.

Q But this all came as a surprise to you that there was a Baton Rouge address on the truck, a Florida license plate, and other than the fact that he had crossed the white line you

wouldn't have had any suspicions at this time about this truck, would you?

MR. GILLASPY:

I'm going to object. That's been covered already pretty thoroughly. It's repetitious.

THE COURT:

I think I've got that in my mind.

MR. MARGER:

Excuse me, Your Honor.

THE COURT:

I think I've got in my mind as to that. Let's continue on.

BY MR. MARGER:

Q What happened then, officer?

A I asked him whose truck it was. He told me that he didn't know whose truck it was. And I said, "What do you mean you don't know whose truck it is?" He said, "A fellow at the Union 76 Truck Stop in Slidell gave me $100.00 to drive this truck from Slidell to Rick's Body Shop in Amite. I'm not familiar with the

roads, and that's why I was having trouble keeping the vehicle on the road."

I said, "Well, you have Florida plates wired on the truck. You've got a Baton Rouge address. You've committed a traffic violation. You drove left of center, almost causing an accident, and you don't know who the truck belongs to?" I said, "What's in the truck?" He said, "I don't know." I said, "Well, do you mind if we look?" He said, "No, I don't mind."

He pulled out a bale of keys, and some more keys -- he had keys just jammed in his pocket -- and proceeded to open the truck.

Q You were wearing your inform at this time?

A Just like I am now -- no, sir. I had on long sleeves and a tie at that time.

Q Did you have your gun out, sir?

A No, sir.

Q Your handcuffs?

H.T.,v.II,63

A I handcuffed him after Sergeant Holcomb placed him under arrest.

Q Who opened the truck?

A Him.

Q Did he just go and take the keys out and go open it?

A No. We looked at the bale of keys, and he acted like he didn't know what key. We looked at the bale of keys, and finally he came up with other keys, two on a ring, that opened it.

Q But he opened the truck?

A Yes, sir.

Q You did not attempt to open the truck?

A Attempt to?

Q Yes, sir.

A I tried to help him with that bale, yes. There was a bale of keys that wouldn't open it, yes.

Q Did you go and start fitting the key into the lock?

A Me and him both.

Q Now, prior to the time that he opened the door, according to your testimony, did you advise him that he did not

H.T.,v.II,64

have to open the door?

A No, sir.

Q Did you read him any Miranda warnings?

A No, sir.

Q Did you ultimately go on a raid that day, on the 22nd?

A No, sir.

Q Did you give any information to Trooper Thomasson as to what took place at the time of the arrest of Mr. Lukefahr on that road?

A Would you repeat that, please?

Q Yes, sir. After you arrested Mr. Lukefahr, whenever that took place, and after Sergeant Holcomb came up on the scene, did you then give anybody any information about the arrest of Thomas Lukefahr, other than Sergeant Holcomb?

A I don't understand how you mean that, sir.

Q Well, did you get on the radio and radio that, "I just arrested Mr. Thomas Lukefahr"?

A No, sir.

Q Or whatever his name was supposed to

have been?

A No, sir.

Q Did you do anything?

A Yes, sir. I stood by with the prisoner handcuffed while the narcotics agents surveyed the situation. I also took some pictures of the truck for them.

Q Now I suggest to you, Lieutenant, that in actuality you took the keys from Mr. Lukefahr and attempted, yourself, to open the truck; is that correct?

MR. GILLASPY:

I'm going to object to arguing with the witness, dictating an answer to him, cross examining him.

THE COURT:

You can ask him what he did, but I don't think you need to suggest to him --

BY MR. MARGER:

Q Did you in fact take the keys from Mr. Lukefahr and attempt to open the truck?

A No, sir.

Q And you did not open the truck?

A No, sir.

Q Did you give information to anyone in regard to obtaining a search warrant for some other premises after the arrest?

A The information was --

MR. GILLASPY:

I'm going to object. I don't think that this part has any bearing here. The validity of warrants in another parish are not at issue here. I can't see what was done after the search would have any bearing on the validity of this search.

MR. MARGER:

If the Court please, it has to do with information given by this officer, if any was given in regard to that warrant, which would be impeachment testimony.

THE COURT:

Go ahead.

BY MR. MARGER:

Q After the arrest, sir, prior to your getting to your barracks, or wherever you were going when you are ready to take off duty, did you make a report to anyone within a half hour or an hour of the time of the arrest?

A Are you talking about an arrest report, sir?

Q Did you do anything in regard to the arrest while you were on the road before you got back to your office or barracks?

A No, sir, other than transport the man to jail.

Q Did you have any conversations after the truck was, as you testified, opened by Mr. Tom Lukefahr as to its contents or as to his rights?

A Did I have -- would you repeat that?

Q Did you discuss with Mr. Lukefahr about the contents of the truck, or anything else --

A No, sir.

Q -- in regard to the arrest?

A No, sir.

Q Did you write the traffic ticket?

A Yes, sir.

Q Where is it?

A I would imagine its in the D.A.'s office up here where I filed it.

Q You never gave it to Mr. Lukefahr?

A We don't give them, sir.

Q You do not give traffic tickets?

A No, sir, not to out-of-staters. They have to go in and post bond at the jail. I turned my copy in with his possessions at the jail.

Q Do you have any knowledge as to whether that was filed with any authority other than the D.A.?

MR. GILLASPY:

I object to that. That has no bearing on a search which had already taken place.

THE COURT:

I think that's true. I don't mind you going into what he said in the affidavit for purposes of impeachment, but to the filing

of the thing, that has nothing to do with this court here.

MR. MARGER:

I'm sorry, Your Honor.

BY MR. MARGER:

Q Lieutenant, where was Sergeant Holcomb at the time that the back of the truck was opened by, in the case of your testimony, Mr. Lukefahr?

A The exact location of Sergeant Holcomb I don't know, sir.

Q Was he there when the back of the truck was opened?

A He wasn't standing there with me and this man, no sir.

Q Was his car there?

A He pulled up there. After -- when I stopped the truck, he pulled up, and then he took off after another truck, and then he pulled up and stopped there again. But being out of the car and where he was, I don't have any idea.

Q Do you have any idea if Sergeant Holcomb was anywhere near you when that

truck door was being opened or about to be opened or immediately after it was opened?

A His car was behind mine.

Q So that in any event the car was there at the time that the door was opened?

A Yes, sir.

Q Had he already stopped whoever he stopped?

A Apparently he had.

Q Did you see who that was?

A No, sir.

Q Did you see where he stopped him?

A No, sir.

Q Did you ever see the man who was stopped?

A No, sir.

Q Now, can you tell us of the first conversation that you had with Sergeant Holcomb after you had the back of the truck opened by whomever opened it?

MR. GILLASPY:

Now I object to that. What was said after the truck was opened is immaterial to the validity of the opening of it. It could not

Transcript of Trial

V. I

Q Now sergeant Holcomb, did the fog interfere with your vision of this truck? I mean --

A No, sir.

Q -- had it interfered with your vision of the persons around the Carr house or in and about the house?

A At the house, no, sir. I was close enough I could see them.

Q When the truck pulled over and stopped on the side of the road, what did you do?

A I radioed back to Lieutenant Wicker to stop, don't catch up with us. I said, "The man is checking to see if he's being followed and he made me. I'll have to continue on. Would you pick him up from the rear?"

Q What happened then?

A I went around the curve and slowed down and

shut my lights off, and just shortly thereafter the blue truck continued on with his lights on. Lieutenant Wicker began bringing up the rear, and as we went around the second curve I think the truck driven by Tom went across the centerline and forced another vehicle off onto the shoulder. Lieutenant Wicker radioed me. He said, "Do you see that?" I said, "I sure did." And he said, "I'd better stop him before he has an accident."

MR. UNSWORTH:

Objection.

MR. GILLASPY:

The fact that he said it is what's relevant, I think, not the truth of it.

THE COURT:

I'll overrule that objection.

BY MR. GILLASPY:

Q What did Wicker say?

A He said, "I'd better stop him before he has an accident."

Q And what did he do then?

A Well, I really didn't want him to stop him. I wanted to follow the truck to its destination, but I said, "Okay. Let's go ahead and stop him."

Q And?

A And we were approaching the intersection at Richardson and fell of the left near the store, looked to Wicker catching up with the truck with the red light and the siren.

Q Where did the truck stop, the blue Ford with the bob-tailed truck?

A Just through the intersection of Richardson, which is LA-10 or LA-440.

Q Who was driving it when it stopped?

A Tom Davidson or Tom Lukefahr.

MR. UNSWORTH:

Objection, Your Honor, to the use of the name Davidson.

THE COURT:

Overruled.

BY MR. GILLASPY:

Q What happened then? What did you do then?

A Just for a short minute or two I was distracted with stopping a small

foreign pickup truck.

Q Why did you stop it?

A Well, while we were on surveillance right before and in daylight at the farm this truck had been seen here and here by different surveillance units, and we didn't know whether or not he was part of the deal.

Q Did it turn out that he was?

A No. It turned out to be a man I've known for years and years, Wayne McElvane.

Q Why didn't you recognize him at first?

A He had two much hair and a moustache. He had on a motorcycle jacket with patches. When I approached his car I

saw a shotgun laying across his lap in the seat.

Q Had he in fact served under you in the National Guard?

A Yes, sir.

Q What did you do with him?

A I told him, "Get out of the way." I said he had no business being there. He said, "I'm gone. I'm just curious. I'm on my way to work."

T.T.V.I., p.95

Q What did you do then?

A I drove back to where Lieutenant Wicker had Tom and the truck stopped.

Q What did you see and hear at that time?

A Lieutenant Wicker was advising Tom as to why he had been stopped and was questioning him as to why he had a Florida driver's license and a Baton Rouge, Louisiana, sign on the truck door and a Florida license plate on the back of the truck that was swinging -- it had been hung up with some wire, sort of a temporary deal.

Q When Lukefahr got out of the truck, did you hear him make any statement?

A Lieutenant Wicker advised him --

MR. UNSWORTH:

Objection, Your Honor, unless the proper predicate is laid under Article 703 of the Code of Criminal Procedure.

MR. GILLASPY:

So far as the res gestae, Your Honor, I don't know of any predicate indicated that we've done it.

T.T.V.I., p.96

It was predicted already leading up to this. I wouldn't know of any of this.

THE COURT:

You're referring to notice.

MR. UNSWORTH:

Not notice, no, but required under Article 703 as to the fact which the District Attorney is going to attempt to be used at the time of trial.

THE COURT:

Have you served notice on him?

MR. GILLASPY:

I served notice of the fact that these statements were to be made and be used and it was going to be considered part of the res gestae. I did that as a precaution. I didn't think it was necessary.

THE COURT:

Well, the foundation is made. The culpatory statement was made after the man was placed under arrest. If you are trying to show just an

PAGE 96 NOT INCLUDED IN ANY

COPY FILED WITH THE COURT

extemporaneous statement made before anything had happened, I don't have a statement, anything to show what was the time involved in -- you have got to lay it out of the presence of the jury as to just what you're going to do.

MR. GILLASPY:

Yes, sir.

THE COURT:

Take the jury out.
(Whereupon the jury was removed from the courtroom.)

THE COURT:

Okay, Mr. Gillaspy, let's get the sequence.

BY MR. GILLASPY:

Q Okay, Sergeant Holcomb, do I understand -- without you saying what -- that you heard this man say something at the time he was -- after the time he got out of the truck, or about that time?

A Lieutenant Wicker advised him as to why he had been stopped. I heard him say,

"Yes, I did that, and the reason for it is I'm lost. I'm looking for a road sign."

Q Did you then hear him say anything regarding where he came from, who he was, any of that?

A Yes, sir, and that was in response to Lieutenant Wicker's questions as to, "Why do you have a Louisiana" -- correction -- "Florida driver's license, Florida plate on your truck and a Baton Rouge, Louisiana, sign on your truck door?" He said, "I don't know a thing about that. I was paid a hundred dollars by a man I don't know to drive this truck from the Union 76 Truck Stop in Slidell to Ricks Brothers Body Shop in Amite."

MR. MARGER:

May I cross examine on the predicate?

BY MR. GILLASPY:

Q Was that about how long, you had said, after he had stopped previously?

A It was in the first conversation in the first several minutes.

MR. GILLASPY:

All right, sir, Would you answer counsel's questions?

CROSS EXAMINATION:

By MR. MARGER:

Q Is it your testimony, Sergeant Holcomb, that you were present at the time that Mr. Lukefahr got out of the cab of the truck?

A Not initially, no, sir.

Q Is it your testimony that at the time that Mr. Lukefahr got out of the truck

you then drove up prior to that time that he began speaking with the Lieutenant?

A. Well, he was out of the truck. Lieutenant Wicker had him out of the rear of the truck talking when I had finished with the other truck and drove up there.

Q. I think we'd better get a sequence of events down to show that we're talking about the same time and place. Did you, in addition to chasing Mr. Wayne McElvane, during the time that this truck was stopped also have occasion, during. . .

the period of time that Mr. Lukefahr was staying with the truck and Lieutenant Wicker, to go to some other place to pick up a driver's license?

A. No, sir.

Q. So it's your testimony that almost all of the time that Mr. Lukefahr was stopped from the time he was stopped you were within hearing range of what he was saying?

A. No, sir, I didn't say that.

Q. Would you be extremely specific about a sequence of events that led up to your hearing that conversation? You were chasing him, the Lieutenant was chasing him, the Lieutenant told you he was going to stop him. According to your testimony, the

Lieutenant then turned on his lights, Mr. Lukefahr pulled a little further up the road than you thought was necessary. What happened then? Did Lieutenant Wicker stop behind the truck?

A. Lieutenant Wicker stopped behinc the truck

as the truck stopped.

Q. How far was he from the truck?

A. Oh, 10, 15 feet.

Q. Then what did you do at that time? Did you also stop?

A. No, sir. I pursued the little pickup truck over the hill. He made a U turn, and so did I. We came back and we stopped somewhere between the truck and the intersection.

Q. How far were you from the truck at the time you stopped Mr. McElvane?

A. 150, 200 yards.

Q. When you were 150, 200 yards away from where Mr. Lukefahr was speaking supposedly to Lieutenant Wicker, could you overhear their conversation?

A. No sir, I could not.

Q. How much time did it take for you to follow the little foreign truck, for it to come down, and for you to question the driver of that truck or speak with him?

A. Two to three minutes.

Q. Total time?

A. Maybe three or four. I wasn't looking at my watch then.

Q. And after you finished speaking to Mr. McElvane, what did you do?

A. I just backed my car, drove my car up and turned it around and backed it up right behind Lieutenant Wicker's vehicle.

Q. And where was Mr. Lukefahr and the Lieutenant at that time?

A. At the rear of the truck.

Q. Were the truck doors open?

A. No, sir.

Q. What was being said at that time?

A. Lieutenant Wicker was still inquiring as to, "Who are you? Where are you from?" and, "What's going on? Who owns the truck?" Generally questioning when you stop a subject under these circumstances.

Q. Did you hear Lieutenant Wicker ask him for his driver's license?

A. No, sir. I believe he had it when I got there.

Q. Did you hear Lieutenant Wicker ask him why there was Florida license plates on the

truck?

A. Yes, sir.

Q. And he did not ask that until you arrived?

A. I heard him ask it. I don't know if he asked it before I arrived. I think he asked him the second time in my presence because Tom wasn't swift with an answer.

Q. Why did you say "the second time?"

A. Well, Tom was -- he seemed to me like he was afraid to open his mouth.

Q. Did you hear Lieutenant Wicker ask him anything else?

A. He asked him who owned the truck.

Q. Now, when the doors opened, Sergeant Holcomb?

A. I placed Tom under arrest, by my watch, at 7:20 a.m., so it was two or three minutes prior to that.

Q. Were you present at that time?

A. At the time the truck doors were opened?

Q. Yes.

A. I was seated in my vehicle.

Q. Did you notify this man prior to the time that those truck doors were open that

he was under arrest?

A. No, sir. I had no reason to.

Q. Had anybody else, to your knowledge?

A. Lieutenant Wicker.

Q. He had notified him he was under arrest?

A. As I testified earlier in this same court, the traffic stop can or it can't be an arrest. It depends on your definition. But he told him -- Tom --that he would have to go to the sheriff's office to post bond for the violation.

Q. At the time that Mr. Lukefahr was stopped by Lieutenant Wicker, was he the suspect for the violation of any crime other than going around the white line?

MR. GILLASPY:

I'm going to object to this. We covered it all in the motion to suppress.

Q Now, Sergeant Holcomb, after the truck door was opened what did you do then?

A I got out of my car, went to the truck, and I could see the bales of what turned

T.T.V.I., p.109

out to be marijuana, and I saw one bale broken open. I looked at it, and I picked up some of it. I turned around, in the presence of Lieutenant Wicker placed Tom Lukefahr under arrest for possession of marijuana with intent to distribute, gave him his so-called Miranda rights, and noted the time to be 7:20 a.m.

Q What if anything did you do or have done with the truck and its cargo?

A I stayed with the truck until it was brought into town where the contents of the truck -- that's the bales of marijuana -- were all off-loaded, weighed and placed in a new truck and a lock put on it.

Q Were they weighed in your presence?

A Yes, sir.

Q Do you remember the weight of each bag?

A Yes, sir.

Q Do you know approximately how many bags there were?

A Yes, sir, 73.

Q Did you compute the total weight of the

T.T.V.I., p.110

cargo of that truck?

A Its total weight was 4,092 pounds, approximately.

Q Let me ask you this: How long have you been working with narcotics?

A I'm in my fourth year now.

Q Has much or some of that work involved marijuana?

A The majority of it.

Q Can you say, as an experienced narcotics officer, if marijuana tends to gain or lose weight as it is opened and aired out?

A In the course of a few days, if it's in a dry place, it will lose weight as it dries.

Q But at this time how much did that cargo weigh?

A Approximately 4,092 pounds.

Q What did you do with it then?

A We placed it under guard here in the Franklinton Sheriff's Office.

Q Did you take or have it taken anywhere else?

A The next morning I arranged for some

marijuana in it?

A No, sir. I do not.

Q Prior to the time that Mr. Lukefahr was arrested on the road did you know that there was marijuana in that truck?

A In the truck driven by Tom Lukefahr?

Q Yes.

A No, sir, I did not.

Q Did you discuss with anybody about the marijuana being in the truck prior to the arrest?

MR. GILLASPY:

I'm going to object to that as being immaterial. The motion to suppress has been heard.

THE COURT:

Unless there is an independent relevance.

MR. MARGER:

Your Honor, this has to do with the credibility of the witness. It has nothing to do with the motion to suppress.

THE COURT:

For purposes of credibility it's

admissible.

BY MR. MARGER:

Q Did you or did you not know that there was marijuana in that truck prior to the time it was stopped by Lieutenant Wicker for crossing the white line?

A I had reason to believe it contained contraband, yes, sir.

Q Hasn't it been your testimony, sir, that the reason that Mr. Lukefahr was stopped was because he crossed the white line with this truck?

A That's correct.

Q And that if he hadn't -- and, to your knowledge, was the traffic citation issued to him for crossing that white line?

A Yes, sir, it was.

Q And is that the reason for his arrest on that day is crossing the white line?

MR. GILLASPY:

I'm going to object now at this point.

That is immaterial and goes into the motion to suppress.

MR. MARGER:

Your Honor, again, it has to do with the credibility of the witness and the credibility of the testimony of the witness.

MR. GILLASPY:

But it has to be relevant evidence in order to impeach his credibility. It can't be ancillary evidence. The Code of Criminal Procedure is clear. It has to be relevant evidence.

THE COURT:

It has to be relevant. I'm going to sustain the objection.

MR. MARGER:

No other questions at this time.

FURTHER REDIRECT EXAMINATION

BY MR. GILLASPY:

Q Officer Holcomb, I believe you testified -- and correct me if I'm wrong -- that you were not able to identify this man until 7:20. Regardless of what name he used or what name he has, had you, prior to that time, seen this physical person who is sitting here?

Transcript of Trial

V. II

THE COURT:

Are you ready? I have that to rule on that motion of change of venue, and I'm going to deny the motion.

MR. UNSWORTH:

To which we will respectfully object.

THE COURT:

Okay. Are we ready now, gentlemen?

MR. GILLASPY:

Yes, Your Honor.

(Whereupon, the jury was brought into the courtroom.)

THE COURT:

Okay, Mr. Gillaspy.

MR. GILLASPY:

Thank you, Your Honor. The State will call Lieutenant Wicker.

WHARTON T. WICKER,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GILLASPY:

Q Your name, sir?

A Wharton Wicker.

Q Your occupation?

A Lieutenant Louisiana State Police.

Q For how long have you been a State Policeman?

A 13 years.

Q Prior to that were you employed by any law enforcement agency?

A Yes, sir. I was a deputy sheriff for four years.

Q Where abouts?

A St. Tammany Parish.

Q Lieutenant Wicker, did you, on the morning of February 22, have occasion to follow a blue Ford truck?

A Yes, sir.

Q Where did you begin following it and where did you follow it to?

A I began following it on -- actually following the truck on LA-10 west of LA-25. I followed it west for approximately two miles, mile and a half to two miles. Do you want me to go ahead?

Q Yes, sir. Just take it in a narrative form.

A Okay. As I followed the truck I noticed several times the dual wheels in the back of it were crossing the centerline, riding the centerline or crossing the centerline. At one point, as the dual wheels crossed the centerline, I met a black General Motors product automobile that the truck had forced off the road, that was going eastbound.

Q Would it have been coming towards you, the Ford car?

A Yes, sir. I noticed, when I looked in the inside, I noticed there was a lady driving. Both the right wheels of her vehicle was off of the traveled portion of the road onto the small shoulder that they have there.

After this truck forced this vehicle off the road by driving left of center, I put my red light on, put my siren on, and stopped the truck.

Q Did you radio Lieutenant Holcomb?

A Yes, sir.

Q Did you tell him that you were going to stop the vehicle?

A Yes, sir.

MR. UNSWORTH:

Objection -- I'm sorry. He's already answered the question.

BY MR. GILLASPY:

Q And where, roughly, in our parish, was the point where you stopped the vehicle? How would you describe it in layman's terms so we could understand? Do you know where Irwin's Store is or where we used to call it Danten Irwin's Store?

MR. UNSWORTH:

Objection. He's leading the witness.

THE COURT:

I sustain it. Don't lead the witness.

BY MR. GILLASPY:

Q How do you refer to it?

A LA-10 and 444.

Q Do you know the name of the community or settlement there?

A I believe it's called Richardson.

Q When you stopped the truck what happened, Lieutenant Wicker?

A I asked the driver to step out and to the rear of the truck. He stepped out of the truck and came to the rear. I noticed that the truck had a Florida license plate on it, and the license plate was wired on the back of it. There was a sign on the driver's door saying Trophy Seafood, Baton Rouge, Louisiana. As the driver came in the rear of the truck I asked to see his driver's license.

Q Did he produce it?

A Yes, sir.

Q Can you identify anyone in this courtroom as being the man who was driving that truck?

A Yes, sir.

Q Would you point at him?

A Right there, sir.

Q Do you have the driver's license that he gave you?

A Yes, sir.

Q May I see it?

A Yes, sir.

MR. GILLASPY:

I offer in evidence this driver's license and ask that it be marked State No. 3.

MR. UNSWORTH:

We would object to the introduction of this into evidence, Your Honor, and I would like to make my objection outside of the ---

MR. GILLASPY:

I think we covered that.

MR. UNSWORTH:

Your Honor, I'd like to make it out-

predicate required by Article 703 of the Code of Criminal Procedure.

THE COURT:

I'm going to overrule the objection.

MR. UNSWORTH:

To which ruling we would object.

BY MR. GILLASPY:

Q Did he orally identify himself to you?

A No, sir. He handed me his driver's license.

Q Now, what statement or what other statement, if any, did this man -- he's sitting here -- make to you at that time immediately after being stopped?

MR. UNSWORTH:

Your Honor, in order to prevent me from interrupting this entire course of testimony, I'd like to maintain a continuous objection to this based upon the same reasons I've previously given.

THE COURT:

The objection is noted. The Court overrules the objection.

A Yes, sir. I advised him of the violation I had stopped him for, which was driving left of the center and forcing this vehicle off the road. And he told me at the time that he

wasn't familiar with the road, he was having trouble with his truck and that he probably did cross the centerline and force the lady off the road.

Q What else, if anything, did he tell you?

A I asked him whose truck it was. He said, "I don't know." He said, "A man at the Union 76 Truck Stop in Slidell gave me $100.00 to drive this truck from Slidell to Rick's Body Shop in Amite."

Q Your question regarding the ownership of the vehicle, is that a routine question asked by highway patrolmen when stopping a vehicle under these circumstances?

MR. UNSWORTH:

Objection, Your Honor, to what is routine. I think we're not relating to what is routine here, we're relating to what this particular case is

all about. The questions are asked and answered. What is routine and what is not routine has no relevancy in this particular case.

MR. GILLASPY:

It has a bearing.

THE COURT:

I see where it has a bearing. I overrule the objection.

MR. UNSWORTH:

To which ruling we object.

BY MR. GILLASPY:

Q Is that a routine question which you are schooled to ask or an inquiry you are schooled to make when stopping a vehicle under these circumstances?

A Yes, sir.

Q Now, you mentioned the license plate being wired on. Has that any particular significance in your training as an officer?

A Yes, sir.

MR. UNSWORTH:

Objection, Your Honor. Now we're

getting into a point of conjecture on the part of this officer. He can tell the jury what he observed and tell the jury what he said. Now we're getting to pure conjecture.

THE COURT:

The objection is overruled.

BY MR. GILLASPY:

Q How long did you say you had been a State Trooper?

A 13 years.

Q Prior to that how long had you been a sheriff's deputy?

A Four years.

Q In your work as a State Trooper do you frequently or only occasionally have occasion to stop vehicles on the highway?

A Frequently.

Q And in stopping vehicles are you schooled to examine the vehicles, to

look at the person driving them, with regard to any questionable or suspicious circumstances? Is that part of your work?

MR. UNSWORTH:

I object, Your Honor. He's leading the witness all over the place.

THE COURT:

He is testifying as being an expert. I overrule the objection.

BY MR. GILLASPY:

Q Was that part of your training?

A Yes, sir.

Q And therefore was it part of your work to look at that license plate?

A Yes, sir.

Q And was it part of your work to look at the decal on the side of the truck?

A Yes, sir.

Q And did they match? Were they coherent?

A No, sir.

Q Why not?

A Because the sign on the door was a Trophy Seafood from Baton Rouge, Louisiana.

The license plate which was wired onto the rear of the truck was a Florida license plate.

Q In your schooling would you then be prompted to inquire as to the ownership of the truck?

A Yes, sir.

Q Why?

A Because it was suspicious in nature.

MR. UNSWORTH:

Objection, Your Honor. Calling for conjecture on the part of the officer.

THE COURT:

I overrule the objection.

BY MR. GILLASPY:

Q Go ahead.

A Suspicious in the point in which the license plate was wired on. This is a common practice --

MR. UNSWORTH:

Objection, Your Honor.

THE COURT:

Overruled.

A (Continuing.) A common practice in

automobile and vehicular theft where the license plates are wired on where they can be changed rapidly.

Q All right, sir. Now at that point, what was done with regard to -- if anything -- to looking in the cargo compartment of this vehicle?

First, would you describe the vehicle for us, physically?

A Yes, sir. It was a blue Ford diesel van type truck, tandem axle, approximately 35 feet long. It was a refrigerated van, not truck, totally enclosed rear section.

Q Did you say it was single axle or tandem axle?

A Tandem.

Q What was done with regard to looking in the cargo compartment of that truck?

A I asked Mr. Davidson what was in his truck.

Q And, again, who is Mr. Davidson?

A This man right here, sir.

Q All right, sir. What name appears on this driver's license which is in evidence?

A Thomas Davidson.

Q Now, you asked Mr. Davidson what was in the cargo part of his truck, and what response did you get?

A He said he didn't know, and he repeated the fact that the man paid him the $100.00 to drive the truck.

Q To where?

A To Rick's Body Shop in Amite.

Q What was done then?

A I asked him if he would mind opening the truck.

Q What did he say?

A "No, sir." He said, no, that he didn't know what was in it, and he pulled out the keys and began to fumble with the lock and attempt to open it.

Q Did he have one key, a bunch of keys, two or what?

A He had two or three sets; one big, large set with many keys on it, and he had another individual set besides that.

Q Which set did he try first?

A The large group with many keys on it.

Q Did any of them work?

A No, sir.

Q Did he hurry, or did he take his time?

A He took his time fairly well.

Q Then what did he do?

A He then produced a separate set, and it unlocked the lock.

Q All right, sir. And when the lock was unlocked what happened?

A He opened the truck up, and there was these bales of vegetable like matter in the back of the truck, and Sergeant Holcomb stepped forward, identified himself, and placed him under arrest for possession of marijuana -- or that substance -- and advised him of his constitutional rights.

Q Would you wait just a moment?

A Yes, sir.

Q I have a series of pictures, Lieutenant Wicker. I'm going to ask you if you were present when these were taken. Would you look at them, please, sir?

A Yes, sir. I took these pictures.

Q All right, sir. Would you start with one of them, any one of them, and --

THE COURT:

Show them to defense counsel.

Your Honor, here again I object to both counsel working on one witness. We've always had a rule, which I have always tried to observe that one counsel is confined to one witness.

THE COURT:

I'd rather have the same counsel making the objection. You can go ahead, Mr. Marger, just from now on I want the same counsel making the objection. You can alternate on the witnesses. I don't care how you alternate on the witnesses, but I just don't want two doing -- one making the objection and one examining the witnesses. We've already had this rule.

CROSS EXAMINATION

BY MR. MARGER:

Q. Lieutenant Wicker, you arrested this man not because of marijuana in the truck, but because he cross the white line?

A. The yellow dash line, yes, sir.

Q. And isn't it true that you were called

earlier in the case because you were to make an arrest regarding marijuana?

A. Would you repeat that, sir?

Q. Weren't you called earlier that morning to work with Sergeant Holcomb for the purpose of making an arrest --

A. No, sir.

Q. -- in regard to marijuana?

A. No, sir, not for the purpose of making an arrest.

Q. Didn't Sergeant Holcomb tell you that he wanted a uniformed trooper so that he could make an arrest and so that there could be a display of the uniform?

A. No, sir.

Q. Officer, have you testified before this Court before in regard to this case?

A. Yes, sir.

Q. And did you testify that Sergeant Holcomb had told you that he needed a uniformed officer, that he was conducting a surveillance and he might need help to make an arrest and that he needed a uniformed officer?

MR. GILLASPY:

I'm going to object unless the testimony was read verbatim. I remember the testimony. I remember the word possible raid.

THE COURT:

If you're going to read it verbatim, Mr. Marger --

BY MR. MARGER:

Q. "A: He told me that he needed a uniformed officer, that he was conducting a surveillance it might help to make an arrest, and that he needed a uniformed officer." Did you state that?

MR. GILLASPY:

I'm going to also ask that before the testimony from the witness was read the question by this counsel be read to him. I happen to remember this sequence of questions, and there are some additional answers.

THE COURT:

He can answer that question first.

A. Yes.

BY MR. MARGER:

Q. Now is it your testimony, though that you were not originally contacted for the purpose of being a uniformed officer in a position to make an arrest as a uniformed officer prior to the traffic violation?

MR. GILLASPY:

I'm going to object unless the entirety of the witness's testimony

on this score is read, because it clears it up.

THE COURT:

What I'm going to do, Mr. Gillaspy, I'll give you the chance to take that up right there and ask him all the questions you want to to clarify it.

Now, go ahead, Mr. Marger.

MR. MARGER:

To which we object, Your Honor, on the grounds that the purpose of that particular question was the impeachment of the officer's statement made at this time and for the specific purpose of

impeaching the testimony.

THE COURT:

He has a right to rehabilitate his witness, and he can do so.

BY MR. MARGER:

A. Go ahead, sir. Was that your statement?

A. Was that my statement? That what, sir?

Q. That I just read to you. Did you testify that way?

A. Yes, sir, that was my testimony.

Q. Now, is it true or is it not true

that you were brought in by Sergeant Holcomb for being a uniformed trooper in order to make an arrest?

A. Are you saying "in order to make an arrest"?

Q. To be available at the time of an arrest to display the uniform?

A. Yes, sir.

Q. Now, you have testified to this jury that the real reason that you arrested this man was because he crossed a line in the middle of the street. Is that true?

A. Yes, sir.

Q. And you knew about the truck having

marijuana in it before you made the arrest, did you not?

A. No, sir.

Q. So that you were surprised when the truck was opened by you for a traffic violation to find marijuana in that truck?

A. No, sir.

Q. Because normally in traffic violations if it's a truck it carries marijuana?

A. I'm going to object to that question.

THE COURT:

Your cross examining, Mr. Marger,

but don't try to argue with him.

BY MR. MARGER:

Q. Now, you used the words "a stolen vehicle," and "illegal vehicle" in regard to your knowledge based on the wiring on of license plates. Was this vehicle stolen?

A. No, sir.

Q. Was it a Florida registered vehicle?

A. Yes, sir.

Q. Was it registered to the license plates

that were on that truck?

A. Yes, sir.

Q. Have you ever seen another truck on which license plates were wired but was not stolen, in your experience as a police officer?

A. Yes. Sure.

Q. At the time of stopping because of this alleged traffic violation did you see the person who you say was run off the road?

A. Yes, sir.

Q. Did you ever speak with that person?

A. No, sir.

Q. Did you ever send anybody after that person?

A. No, sir.

Q. As a matter of fact, was there such a person?

A. Yes, sir.

Q. When you stopped the truck, officer, did Mr. Lukefahr give you any resistance of any type, nature or kind?

A. No, sir.

Q. Was he in any way armed?

A. No, sir.

Q. Was he cooperative with you?

A. Yes, sir.

Q. And it's your testimony that you opened the truck voluntarily?

A. Yes, sir.

Q. Was he surprised at what was found inside?

A. No, sir.

Q. How do you know?

A. He didn't act surprised?

Q. How did he act?

A. Just like he's sitting there now.

MR. MARGER:

I have no other questions.

REDIRECT EXAMINATION

BY MR. GILLASPY:

Q. Now, then, just a minute, Lieutenant Wicker. I don't have this indexed. Lieutenant Wicker, I'm looking here with regard to the questions counsel asked you. Was it your intention initially to stop the truck at that point in time?

A. No, sir.

Q. Why did you stop it at that point?

A. Because I felt it was creating a hazard.

Q. All right, sir. Now I refer you to page 54 of this transcript, Lieutenant Wicker. Would you read your answer beginning at Line 9?

A. Yes, sir.

MR. MARGER:

I'm going to object to any reading of previous testimony. If the witness would like to testify as to what he knows or what he says and testifies in a truthful manner, there is no place for the reading.

THE COURT:

The proper way to do it is to ask him questions and clarify the impeachment statement then go to that.

BY MR. GILLASPY: